

RECORD OF TRIAL COVER SHEET

**IN THE
MILITARY COMMISSION
CASE OF**

UNITED STATES

V.

ABDUL ZAHIR

ALSO KNOWN AS:

ABDUL BARI

No. 060001

VOLUME ____ OF ____ TOTAL VOLUMES

**2ND VOLUME OF REVIEW EXHIBITS
(RE): RES 25-36**

**MAY 17, 2006 SESSION
(REDACTED VERSION)**

United States v. Abdul Zahir, No. 060001

INDEX OF VOLUMES

A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at <http://www.defenselink.mil/news/commissions.html>.

Some volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to the Appointing Authority's administrative certification.

Transcript and Review Exhibits are part of the record of trial, and are considered during appellate review. Volumes I-VI, however, are allied papers and as such are not part of the record of trial. Allied papers provide references, and show the administrative and historical processing of a case. Allied papers are not usually considered during appellate review. *See generally United States v. Gonzalez*, 60 M.J. 572, 574-575 (Army Ct. Crim. App. 2004) and cases cited therein discussing when allied papers may be considered during the military justice appellate process, which is governed by 10 U.S.C. § 866). For more information about allied papers in the military justice process, see Clerk of Military Commission administrative materials in Volume III.

VOLUME
NUMBER

SUBSTANCE OF CONTENTS

ALLIED PAPERS Not part of "record of trial"

- | | |
|-----------------------|--|
| I¹ | Military Commission Primary References (Congressional Authorizations for Use of Force; Detainee Treatment Act; UCMJ articles; President's Military Order; Military Commission Orders; DoD Directive; Military Commission Instructions; Appointing Authority Regulations; Presiding Officer Memoranda—includes DoD rescinded publications) |
| II¹ | Supreme Court Decisions: <i>Rasul v. Bush</i>, 542 U.S. 466 (2004); <i>Johnson v. Eisentrager</i>, 339 U.S. 763 (1950); <i>In re Yamashita</i>, 327 U.S. 1 (1946); <i>Ex Parte Quirin</i>, 317 U.S. 1 (1942); <i>Ex Parte Milligan</i>, 71 U.S. 2 (1866) |

¹ Interim volume numbers. Final numbers to be added when trial is completed.

United States v. Ali Hamza Sulayman Zahir, No. 060001

INDEX OF VOLUMES

<u>VOLUME NUMBER</u>	<u>SUBSTANCE OF CONTENTS</u>
III²	DoD Decisions on Commissions including Appointing Authority orders and decisions, Chief Clerk of Commissions documents
IV²	Federal Litigation in <i>Hamdan v. Rumsfeld</i>, at U.S. Supreme Court and D.C. Circuit
V²	Federal Litigation at U.S. District Courts Not Filed by Counsel in <i>United States v. Zahir</i>
VI²	Selected filings and U.S. District Court decisions in <i>United States v. Zahir</i>

Record of Trial

VII²	Transcript (R. 1-82) (April 4, and May 17, 2006 sessions)
VIII²	Review Exhibits 1-24 (April 4, 2006 session)
IX²	Review Exhibits 25-36 (May 17, 2006 session)

² Interim volume numbers. Final numbers to be added when trial is completed.

UNITED STATES V. ABDUL ZAHIR,
No. 060001—2ND VOLUME OF REVIEW EXHIBITS

Description of Exhibit	PAGE No.
-------------------------------	-----------------

2ND VOLUME OF REVIEW EXHIBITS: RES 25-36 (258 PAGES)
SESSION OF MAY 17, 2006

<u>RE 25</u>	Partial trial schedule, Apr. 6, 2006 (1 page)	<u>1</u>
<u>RE 26</u>	Presiding Officer approves a 30 day Defense requested delay in discovery, Apr. 13, 2006 (2 pages)	<u>2</u>
<u>RE 27</u>	Presiding Officer and parties discuss scheduling in emails, Apr. 13, 2006 (5 pages)	<u>4</u>
<u>RE 28</u>	Presiding Officers approves a Prosecution requested delay in discovery, Apr. 18, 2006 (2 pages)	<u>9</u>
<u>RE 29</u>	Translator review of session tape recordings from <i>United States v. Zahir</i> , hearing on Apr. 4, 2006 and determination of no significant translator error, Apr. 24, 2006, and resume of translator who conducted the review (2 pages)	<u>11</u>
<u>RE 30</u>	D1, Defense motion to return the Accused from Camp 5 to Camp 4, May 4, 2006 (11 pages)	<u>13</u>
<u>RE 31</u>	Defense request for subpoena for COL Bumgarner, May 11, 2006, and email correspondence concerning this subpoena, May 11, 2006 (total exhibit is 215 pages)	<u>24</u>
	1. Unauthenticated transcript from <i>United States v. Barhoumi</i> , (R. 20-217). Authenticated transcript is available with Barhoumi record of trial. Available at: http://www.defenselink.mil/news/commissions_exhibits_barhoumi.html	<u>41</u>
<u>RE 32</u>	D1, Prosecution response to Defense motion objecting to move of Accused from Camp 4 to Camp 5, May 10, 2006 (12 pages)	<u>239</u>
	1. Unauthenticated transcript from <i>United States v. Barhoumi</i> , testimony of COL Bumgarner (R. 44-155)	<u>250</u>

UNITED STATES V. ABDUL ZAHIR,
No. 060001—2ND VOLUME OF REVIEW EXHIBITS

<u>Description of Exhibit</u>	<u>PAGE No.</u>
<u>RE 33</u> Email approving Defense delay in Discovery, May 11, 2006 (2 pages)	<u>251</u>
<u>RE 34</u> CV for Farsi interpreter (Sealed) (1 page)	<u>253</u>
<u>RE 35</u> CV for Farsi interpreter (Sealed) (1 page)	<u>254</u>
<u>RE 36</u> Service of the Accused's Charges and Charge Sheet in the language Farsi (4 pages)	<u>255</u>

Partial Trial Schedule – US v Zahir – 6 Apr 06

Motions as to Discovery Order due	N/A	POM 4-3
Discovery completed – Prosecution	17 Apr 06	
Discovery completed – Defense	17 Apr 06	
Requests for access to evidence		POM 7-1
Witness requests on access to evidence or discovery motions		POM 10-2
Litigate Discovery and access to evidence motions		
“Law” Motions: <i>Motion</i>	11 Jul 06	POM 4-3
“Law” Motions: <i>Response</i>	11 Aug 06	POM 4-3
“Law” Motions: <i>Reply</i>	16 Aug 06	POM 4-3
Witness requests on law motions	1 Aug 06	POM 10-2
Litigate law motions	21 Aug 06	
Evidentiary motions: <i>Motion</i>	1 Aug 06	POM 4-3
Evidentiary motions: <i>Response</i>	1 Sep 06	POM 4-3
Evidentiary motions: <i>Reply</i>	per POM 4-3	POM 4-3
Witness requests on evidentiary motions	1 Sep 06	POM 10-2
Litigate evidentiary motions	12 Sep 06	

Note: The day to litigate as listed above indicates the date the term is to begin. Trial terms are scheduled to last two weeks.

Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Thursday, April 13, 2006 9:27 AM
To: Bogar, Thomas, LTC, DoD OGC; Hodges, Keith
Cc: [REDACTED]

Subject: RE: Defense request for special relief IAW POM 4-3 for extension of Discovery Deadline - U.S. v. Abdul Zahir

The Presiding Officer has approved the extension requested by the defense.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[REDACTED]

From: Bogar, Thomas, LTC, DoD OGC [REDACTED]
Sent: Wednesday, April 12, 2006 1:33 PM
To: 'Hodges, Keith'
Cc: [REDACTED]

Subject: Defense request for special relief IAW POM 4-3 for extension of Discovery Deadline - U.S. v. Abdul Zahir

Mr. Hodges -

The Defense respectfully requests relief from the Discovery Order and asks that the current deadline of 17 April 2006 be extended to 17 May 2006. This request is made with the understanding that following approval, as soon as practicable, the Defense will provide responses to discovery. The Defense also recognizes that discovery is a continuing obligation.

As discussed in our last 8-5 held during the April 2006 Term, the Government is expected to provide supplemental discovery to those documents previously provided prior to the original 17 March 2006 deadline. An extension of 17 April 2006 was granted to the Government to comply with its remaining discovery duty.

The Defense and Prosecution have discussed this issue, and the Government has no objections.


As such, the Defense respectfully requests an extension of the discovery deadline until 17 May 2006.

V/R


RE 26 (Zahir)
Page 1 of 2

TJB

Thomas J. Boger, LTC, JA
Office of Military Commissions
Office of the Chief Defense Counsel



CONFIDENTIALITY NOTICE. The information contained in this e-mail and any accompanying attachments may constitute confidential, attorney-client information and work product which is legally privileged. This information is the property of the individual attorney and respective client. If you are not the intended recipient of this information, any disclosure, copying, distribution or the taking of any action in reliance on this information is strictly prohibited. If you received this e-mail in error, please notify us immediately by return e-mail or by calling (703)



Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Thursday, April 13, 2006 1:33 PM
To: Bogar, Thomas, LTC, DoD OGC; Hodges, Keith
Cc: [REDACTED]

Subject: RE: Trial Schedule - U.S. v. Abdul Zahir

Attachments: Trial Terms of the Military Commission at Guantanamo Naval Base (13 Apr 2006).pdf

LTC Bogar, thank you for bringing this matter to the Presiding Officer's attention.

1. I prepared a new Master Term calendar, and a copy of that calendar is attached.
2. It was the Presiding Officer's intention to "double-docket" cases during the same term, and to have multiple-week trial terms. We are sorry that was not made clear to all counsel during docketing discussions. "Double-docketing" is the only way the Presiding Officer can provide notice to counsel when their presence might be needed at Guantanamo, set the motion practice schedule, and still provide flexibility on how and when within a trial term the motions will be litigated given the number, complexity, witnesses, and other considerations. Once the Presiding Officer is aware of exact number and nature of the motions slated for litigation, he will work with counsel to fine-tune the docket.
3. Concerning consolidation of the litigation of all Zahir motions during the 12 September term, no one knows the number, complexity, or nature of any motions. If the number and complexity of motions allow for us to dispose of all of them during the week of the 12th, we can modify the schedule do that. It would be premature make that modification at this point and counsel are invited to raise this issue anew as we get closer to the relevant scheduled trial terms.
4. We are aware of your leave plans and the Presiding Officer will work closely with counsel to avoid interfering with them.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[REDACTED]

From: Bogar, Thomas, LTC, DoD OGC [REDACTED]
Sent: Tuesday, April 11, 2006 10:11 AM
To: 'Hodges, Keith'
Cc: [REDACTED]

OGC

Subject: Trial Schedule - U.S. v. Abdul Zahir

Mr. Hodges -

On receipt of the "Trial Terms" today, I respectfully request clarification with respect to that document and how it may conflict with RE 25.

Specifically, the "Trial Terms" schedule Khadr for the 21 Aug 06 Term, when that date was reserved for litigating law motions as per RE 25.

I also note that the September Term is now two weeks and U.S. v. Abdul Zahir is calendared for motions during that period. During this period, U.S. v. Khadr is calendared for trial. As you can see, there is some confusion as to the dates.

As discussed during our pre-trial conference last week, I am looking to schedule leave during my anniversary (167 SEP through 1 OCT 06) and would like to ascertain trial dates prior to economically committing myself to travel.

Please advise during what period you anticipate the law motions will be argued, and during what trial period the pre-trial motions will be argued.

The lead prosecutor, Mr. [REDACTED] (CPT [REDACTED] when on title 10 status) and I have spoken regarding this issue. He has a reserve obligation where he must leave GTMO by 23 AUG 06 and has no objections to arguing law and pre-trial motions during the September Term.

In addition, the prosecution and defense have agreed, with the Court's permission, to argue the law and pre-trial motions 12 SEP 06 through 16 SEP 06.

We are both available for an 8-5 conference call if needed.

Please advise if RE 25 needs to be modified in accordance with the new schedule. If so, [REDACTED] and myself will work to submit a revised Partial Trial Schedule with corrected dates.

V/R

TJB

<<Trial Terms of the Military Commission at Guantanamo Naval Base (10 Apr 2006).doc>> <<RE 25 - Zahir.pdf>>

Thomas J. Bogar, LTC, JA

Office of Military Commissions

Office of the Chief Defense Counsel

[REDACTED]
Arlington, VA 22202

RE 27 (Zahir)
Page 2 of 5

[REDACTED]
[REDACTED]
[REDACTED]

CONFIDENTIALITY NOTICE. The information contained in this e-mail and any accompanying attachments may constitute confidential, attorney-client information and work product which is legally privileged. This information is the property of the individual attorney and respective client. If you are not the intended recipient of this information, any disclosure, copying, distribution or the taking of any action in reliance on this information is strictly prohibited. If you received this e-mail in error, please notify us immediately by return e-mail or by calling [REDACTED]

Trial Terms of the Military Commission Guantanamo Naval Base, Cuba

13 April 2006

Setting trial terms and a docket requires full consideration of many factors, to include: the needs of the accused, counsel, and other participants; logistics; and long-range planning requirements. To best accommodate these needs, and so as to provide full and fair trials, the Presiding Officers have established the below trial terms. Some of these trial terms already have business docketed. Future trial orders and docketing decisions will be announced to associate specific cases and business with specific trial terms and dates.

In addition:

- Other trial terms may be added as necessary.
- Cases may be added to a trial term at any time.
- Trial terms may be extended to accommodate sessions that will require more than one week.

Counsel are responsible for being available to be present at ALL trial terms. Counsel must have absences from a trial term approved by the Presiding Officer.

24 April – 28 April 2006: Sessions in *US v. Barhoumi*, *US v. al Qahtani*, and *US v. al Sharbi* have been docketed for this trial term.

15 May – 19 May 2006: Cases will be added to this trial term by the Presiding Officers.

5 June – 9 June 2006: Cases will be added to this trial term by the Presiding Officers.

12 June – 16 June 2006: Motions, *US v. Muhammad*.

26 June – 7 July (Two weeks.): Law motions in *US v. Khadr*.

10 July – 14 July 2006: Cases will be added to this trial term by the Presiding Officers.

31 July – 4 August 2006: Cases will be added to this trial term by the Presiding Officers.

21 August – 1 September (Two weeks.): Zahir law motions followed by evidentiary motions in *US v. Khadr*.

12 September – 29 September 2006 (Three weeks). Motions, *US v. Zahir* followed by trial in *US v. Zahir*. Trial in *US v. Khadr* continues until completed.

/s/

Keith Hodges

Assistant to the Presiding Officers

Partial Trial Schedule – US v Zahir – 6 Apr 06

Motions as to Discovery Order due	N/A	POM 4-3
Discovery completed – Prosecution	17 Apr 06	
Discovery completed – Defense	17 Apr 06	
Requests for access to evidence		POM 7-1
Witness requests on access to evidence or discovery motions		POM 10-2
Litigate Discovery and access to evidence motions		
“Law” Motions: <i>Motion</i>	11 Jul 06	POM 4-3
“Law” Motions: <i>Response</i>	11 Aug 06	POM 4-3
“Law” Motions: <i>Reply</i>	16 Aug 06	POM 4-3
Witness requests on law motions	1 Aug 06	POM 10-2
Litigate law motions	21 Aug 06	
Evidentiary motions: <i>Motion</i>	1 Aug 06	POM 4-3
Evidentiary motions: <i>Response</i>	1 Sep 06	POM 4-3
Evidentiary motions: <i>Reply</i>	per POM 4-3	POM 4-3
Witness requests on evidentiary motions	1 Sep 06	POM 10-2
Litigate evidentiary motions	12 Sep 06	

Note: The day to litigate as listed above indicates the date the term is to begin. Trial terms are scheduled to last two weeks.

Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Tuesday, April 18, 2006 7:45 AM
To: [REDACTED]
Cc: [REDACTED]

Subject: RE: Prosecution request for special relief IAW POM 4-3 for extension of Discovery Deadline in US v Zahir

The Presiding Officer grants the prosecution request.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[REDACTED]

From: [REDACTED] MAJ, DoD OGC [REDACTED]
Sent: Monday, April 17, 2006 4:24 PM
To: [REDACTED]
Cc: [REDACTED]

Subject: Prosecution request for special relief IAW POM 4-3 for extension of Discovery Deadline in US v Zahir

Colonel Chester -

The Prosecution respectfully requests further relief from the Discovery Order in US v. Zahir. The Prosecution requests that the discovery deadline be extended from the current date of 17 April 2006 to 17 May 2006.

The basis for this request is the same as the Prosecution's earlier request for an extension of the discovery deadline; the Prosecution must obtain permission to release Originator-Controlled (ORCON) documents from the originating agency. Although significant progress has been made in obtaining approval for release of the documents concerned, several agencies have not yet completed their review of all requested documents despite due diligence. To date, we have released 834 documents to Defense. We will release a further 164 documents to Defense by close of business tomorrow. While this represents the bulk of the documentary evidence the Prosecution intends to offer, a number of particularly critical sensitive documents are still in the review process.

This request is made with the understanding that the Prosecution will release all required discovery as soon as practicable. The Prosecution also recognizes that discovery is a continuing obligation.

We have discussed this request with the Detailed Defense Counsel, LTC Bogar. He has indicated that he does not object to this extension.

RE 28 (Zahir)
Page 1 of 2

V/R

[REDACTED]
Major, U.S. Army
Prosecutor
Office of Military Commissions
United States Department of Defense

[REDACTED]

[REDACTED]

[REDACTED]

www.defenselink.mil/news/commissions.html

24 April, 2006

To Whom It May Concern:

I, [REDACTED] have reviewed the transcript in United States v. Zahir for April 4, 2006 and compared it with a tape recording of the proceeding. I certify that there are no significant translation errors as indicated in a letter from Mr. Harvey, dated April 6, 2006.

I reached the above conclusion after carefully studying the text and researching any legal terms that required a better understanding of the proceedings. I then listened to the tape recording once to get used to the voice of the interpreter, before comparing the text and the tape recording. The interpreter succeeded in doing a word for word translation of the commission proceedings, even though at times the exchanges were progressing at a fast pace.

[REDACTED]
RE 29 (Zahir)
Page 1 of 2

ZAHIR
REVIEW EXHIBIT 29
PAGE 2

Review Exhibit (RE) 29 is curriculum vitae of Translators “A,” who reviewed the transcript of the hearing on April 4, 2006, in *United States v. Zahir*. Translator A’s opinion is at page 1 of RE 29.

RE 29 consists of 1 page.

Translator A has requested, and the Presiding Officer has determined that **RE 29, page 2** not be released on the Department of Defense Public Affairs web site. In this instance Translator A’s right to personal privacy outweighs the public interest in this information.

RE 29, page 2 was released to the parties in the case in litigation, and will be included as part of the record of trial for consideration of reviewing authorities.

I certify that this is an accurate summary of **RE 29, page 2**.

//signed//

M. Harvey
Chief Clerk of Military Commissions

**OFFICE OF MILITARY COMMISSIONS
DEPARTMENT OF DEFENSE
U.S. NAVAL STATION, GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA	:	DEFENSE MOTION
	:	For Appropriate Relief – Transfer
	:	Accused to Camp IV
	:	Case 06-0001
	:	
ABDUL ZAHIR	:	May Term 2006

1. **Timeliness.** This Defense Motion is timely filed in accordance with POM 4-3 and Partial Trial Schedule dated 6 April 2006, subsequently marked as RE 25.

2. **Relief Sought.** The Defense respectfully requests an Order to return Abdul Zahir (“Movant”) to Camp 4 for the remainder of the Commission process.

3. **Burden of Proof.** The burden of proof should be on the Government to show by clear and convincing evidence, why its position has changed since April when it endorsed moving Abdul Zahir to Camp 4. The burden can be met if the Government can show that JTF’s interests in keeping Movant detained at Camp 5 outweigh those of Commission and of the Movant.

4. **Facts.**

a. On or about July 11, 2002, Abdul Zahir was apprehended by the U.S. Government and has been held in captivity since.

b. By Order dated July 6, 2004, President Bush preferred charges against Abdul Zahir.

c. On or about 18 January 2006, charges were referred against Abdul Zahir, the only Afghani detainee charged thus far.

d. To date, ten (10) Guantanamo Bay detainees have charges pending against them before this Military Commission.

e. Abdul Zahir is the tenth (10th) detainee charged and was arraigned on 4 April 2006.

f. For most of his time since his capture, Abdul Zahir resided at Camp 4, at least until March 30, 2006.

g. On or about that time, Abdul Zahir, without reason or prior notice to his undersigned counsel, was moved to Camp 5.

h. Of the ten (10) charged detainees, eight (8) have been re-located to the same tier in Camp 5. See Bumgarner Affidavit herein attached as Exhibit "A".

i. Camp 4 is a medium-security facility and is reserved for those detainees that follow the rules.

j. Camp 4 offers several perks, *inter alia*, communal living, 7-9 hours a day of outdoor recreation, television privileges, and eating meals family-style.

k. Unlike at Camp 4, detainees at Camp 5 are permitted just 2 hours of recreation per day and contact with other detainees is limited where there is no communal living.

l. Inter-human contact with other detainees, particularly those of Afghani descent, is difficult if not impossible at Camp 5.

m. On 4 April 2006, the undersigned learned that Abdul Zahir had been transferred from Camp 4 to Camp 5, Guantanamo Bay, Cuba.

n. On the evening of 4 April 2006, the undersigned spoke with JTF SJA, LTC [REDACTED] to inquire of the specifics for the move, particularly why Abdul Zahir had been moved and whether the move was temporary or permanent.

o. LTC [REDACTED] could not provide any answers at that time but promised to follow up the next day. LTC [REDACTED] never contacted the Defense.

p. The same day, the Defense spoke with the lead prosecutor for the captioned matter and was told the Government, vis-à-vis, the Prosecutor's Office, and was told the Government supported the Defense request to move Abdul Zahir back to Camp 4.

q. Later, the Defense was told to contact LTC [REDACTED] by email requesting a teleconference with COL Bumgarner who may be able to provide insight as to why Movant was moved. The Defense never received any response to said request.

r. On 10 April 2006, the undersigned requested a teleconference. See Email dated 10 April 2006, attached hereto as Exhibit "B".

s. On that same day, the undersigned received an email from the Prosecution stating that the request to move Abdul Zahir was denied by RDML Harris. See Email dated 10 April 2006, attached hereto as Exhibit "C".

t. A similar motion was presented during the late April Term in the matter *U.S. v. Barhoumi*.

u. On review of said transcript, several issues remain unanswered which has thus prompted this Motion.

5. Argument.

Prior to 4 April 2006, Abdul Zahir had cooperated with all aspects of the proceedings: he answered law enforcement questions for four (4) years prior to charges being levied; he agreed to attend his arraignment and answer all questions posed by the Presiding Officer; he rose from his chair as the Presiding Officer entered and left the Courtroom; and, he agreed to wear western-style clothes for the proceeding. Essentially, Abdul Zahir has cooperated with the Commission process.

On April 4, 2006, the Defense learned that the Movant had been moved from the medium-security facility at Camp 4 to the high-security facility at Camp 5. Through the Prosecutor's Office, the Government agreed that Abdul Zahir should be re-located to Camp 4, and in fact endorsed said move to the JTF.

Amongst those sharing the same deck at Camp 5 include: Suleiman al Bahlul; Jabran Said Bin al Qahtani; Ibrahim Ahmed Moahmoud al Qosi; Sufyian Barhoumi; David Matthew Hicks; Omar Ahmed Khadr; and, Binyam Ahmed Muhammad. For whatever reason, Ghassan Abdullah al Sharbi and Salim Ahmed Hamdan are not staying at Camp 5.

Of the charged detainees at Camp 5, al Bahlul, al Qahtani, and Muhammad have rejected their assigned military counsel and have threatened to boycott to process. After April 26th, it appears that Sufyian Barhoumi may boycott as well.

Although communication is arduous at Camp 5, the detainees can communicate with each other. In fact, since last seeing Abdul Zahir on April 4th, the Defense has learned that detainees awaiting trial are able to communicate with each

other. This development is particularly disturbing, not only to the Defense and Prosecution, but as well it should be to the Presiding Officer.

A. The Presiding Officer should issue an Order moving Abdul Zahir to Camp 4 in order to preserve the Integrity and Decorum of the Commission Proceedings.

Pursuant to Military Commission Order #1, 4, A, (5)(c) the Presiding Officer is responsible to “. . . ensure that the discipline, dignity, and decorum of the proceedings are maintained. . .”.

In this case, several detainees have disrupted the proceedings whether by refusing counsel, proselytizing, holding signs, or boycotting. Some may say the detainees have been successful at mocking the process as four years have passed and no trials have yet begun. Since November 13, 2001, when the President issued the Military Order justifying the Commission process, the Government has insisted that the detainees will receive “full and fair” trial.

The likelihood that the longer Abdul Zahir remains at Camp 5, the greater he is to become disillusioned with the process and less likely he will be to cooperate. The greater his disillusionment, the more likely he will be to succumb and join those willing to boycott the process.

As more detainees join this list and attempt to disrupt the proceedings, the more likely an effect such disruption will have upon the discipline, upon the dignity, and upon the decorum of the proceedings.

A concerted effort to boycott and disrupt the commission process would not only adversely affect the integrity and decorum of the proceedings, but just as important, would adversely affect the perception that the detainees are getting a full and fair trial.

The Joint Task Force must sufficiently explain why Movant was moved to Camp 5. This reason must outweigh the interests of the Military Commission to proceed, unencumbered with the tribunal.

B. The Presiding Officer should issue an Order moving Abdul Zahir to Camp 4 in order to preserve the Movant's Right to Counsel

It is well established that government interference with the right to counsel is a *per se* violation of the right to counsel. *United States v. Cronin*, 466 U.S. 648 (1984); *Perry v. Leeke*, 488 U.S. 272 (1989). Interference with the attorney-client relationship is significant when the defense cannot adequately perform its function. In such instances, prejudice is presumed and no harmless error standard applies.

Pursuant to MCO #1, 5, D, an accused is entitled to military defense counsel. Apparently the drafters of MCO deemed the right to representation an essential element for providing the accused with a full and fair trial (as per the Presidential Military Order dated November 13, 2001). In fact, the right of counsel is also raised in MCO#1, 4(3), *et. seq.*

As discussed above, it is reasonable that Abdul Zahir will grow more disillusioned the longer he remains in Camp 5. The greater his disillusionment, the more likely he will be to succumb and join those willing to boycott the process, including his military counsel. The strain upon his relationship with his counsel will certainly affect representation if Movant refuses to cooperate with his counsel during the critical pre-trial preparation phase.

Continued detention at Camp 5 has already caused a strain upon the attorney-client relationship. Because the strain is a direct result of Government conduct, Movant has been prejudiced to the point where he has been denied right of counsel. Without counsel, he will be denied a full and fair trial.

C. Detention in Camp 5 Violates Article 13 to the UCMJ.

Finally, Article 13 of the UCMJ limits the level of pre-trial confinement so as not to "... be any more rigorous than the circumstances required to ensure his presence. ..." at trial. *See also, United States v. Crawford*, 2006 CAAF LEXIS 251 (2006). It is important to note that Article 13 begins with the words "No person, while being held for trial. ..." This is distinct from the usual prefatory language found throughout the UCMJ: "No person subject to this chapter . . .," or words to the effect. A strict constructionist comparison of the two provisions should cause this Commission to conclude that

Congress intended Article 13 to apply, not just to Court-Martials, but also to Commissions.

In addition, the Government will need to justify why Movant has been moved to a facility that utilizes more rigorous means of confinement than previously employed. The evidence will show that conditions at Camp 5 are far more rigorous than in Camp 4.

WHEREFORE the Movant, Abdul Zahir prays that this Honorable Commission issue and ORDER moving him from Camp 5 back to Camp 4.

6. Legal Authority.

- a. POM 4-3;
- b. *United States v. Cronin*, 466 U.S. 648 (1984);
- c. *Perry v. Leeke*, 488 U.S. 272 (1989);
- d. Article 13, UCMJ;
- e. *United States v. Crawford*, 2006 CAAF LEXIS 251 (2006);
- f. MCO #1.

7. Oral Argument. The Defense requests oral argument. The Defense anticipates that some information may be considered classified and as such, portions of the testimony may need to be closed.

8. Witnesses. The Movant requests the following witnesses be produced and be present for this motion:

- a. Michael I. Bumgarner, COL, MP, USA
- b. Abdul Zahir, who will testify for the limited purposes of discussing the conditions of his incarceration.

9. Evidence. A subpoena, *duces tecum*, is requested of COL Bumgarner. The Defense specifically requests that COL Bumgarner bring with him a copy (paper print out) of the Powerpoint slides he referenced during the hearing for *U.S. v. Barhoumi* on 26 April 2006.

10. Attachments.

- a. Exhibit "A", Bumgarner Affidavit;
- b. Exhibit "B", Email dated 10 April 2006;
- c. Exhibit "C", Email dated 10 April 2006.

Very Respectfully,

/S/

THOMAS J. BOGAR
LTC, JA, USAR
Detailed Defense Counsel for Abdul Zahir

CERTIFICATE OF SERVICE

I certify that on 4 MAY 2006 a true and correct copy of the forgoing Motion was sent via electronic mail delivery to all counsel of record and to the Assistant Presiding Officer with a copy to the Presiding Officer.

THOMAS J. BOGAR
LTC, JA
Defense Counsel
Detailed Defense Counsel for Abdul Zahir

EXHIBIT "A"

AFFIDAVIT

I, Colonel Michael I. Bungarner, United States Army, under the penalties of perjury, hereby state that, to the best of my knowledge, information, and belief, the following is true, accurate, and correct:

I am a Colonel in the United States Army with over twenty four (24) years of active duty service as a Military Policeman. I am currently assigned as the Commander, Joint Detention Group, for the Joint Task Force Guantanamo, Guantanamo Bay, Cuba. As Detention Group Commander, I am responsible for all aspects of detention operations associated with the care and custody of Enemy Combatants from the Global War on Terror that are being held at U.S. Naval Station, Guantanamo Bay, Cuba. I have served in this position since April 2005. I answer directly to the Joint Task Force Commander, RDM L. Harris, or the Deputy Commander, BG Lemcock.

It is my responsibility, among others, to see that the detention mission is performed in a humane manner that protects the safety and security of the detainees, and the safety of security personnel at JTF-Guantanamo. I am completely familiar with all of the detention areas within the Joint Task Force, including the actual structure and conditions within each area, and the policies and procedures for detention operations in each of those areas.

As of approximately 30 March 2006, eight of ten Enemy Combatants charged with war crimes and scheduled to appear before a military commission have been co-located together on a tier of one of the newest detention camps, known as Camp 5. The other two charged detainees are housed in a different facility. It is my intention to move the remaining charged commissions defendants to this same location when operationally feasible.

Prior to co-locating the charged detainees on the same tier of Camp 5, they were spread out across the camps, living in a number of different facilities. For example, three were living in Camp 4 (including Detainee Khadr), three were living in Camp 3, one in Camp 5. The living conditions of the various charged detainees varied, depending on which camp they were in.

Camp 5 is an American Corrections Association certified maximum-security detention facility. It was designed after a federal maximum-security facility in Indiana. The charged commissions detainees are held in one tier within the same wing of the Camp 5 facility. On this tier, there are 12 cells, of which eight are occupied by the charged detainees.

I am familiar with the American Corrections Association standards and, with respect to the conditions of the detention, neither Detainee Khadr nor the other commissions detainees are segregated, held in isolation, or in solitary confinement. The charged detainees are held in individual concrete cells. The cells are not audio isolated and there is no effort made to disrupt any communication between the detainees from within their cells. They are allowed to participate in daily prayers, which occurs five times each day, and one of the detainees leads those prayers. The tier in which they are housed also has a reading room for the detainees' use on a scheduled periodic basis.

Each detainee is allowed two hours of recreation a day. The recreation fields are divided into eight sections, separated by a link fence. They are able to communicate with each other, but cannot physically touch each other or play games, such as soccer. Six of the detainees participate in recreation at the same time. Two detainees participate in recreation activities in the newer recreation yard. Each recreation yard has physical exercise equipment, such as an elliptical machine for cardio-vascular exercise.

By comparison, Camp 4 is a medium-security, communal living facility in which detainees reside in open bays, with ten detainees per bay. They are able to recreate in groups, including having the opportunity to play games such as soccer, basketball or even chess.

I supported and approved the decision to co-locate the charged detainees within the same tier of Camp 5. I then recommended the movement to the then-Joint Task Force Commander, MG Hood. He approved the decision and the relocation was made. This decision was well-advised and carefully thought out. Input from senior leaders within the Joint Detention Group was obtained in consideration of this decision. It was not arbitrary. The movement was not and does not punish the charged detainees. Furthermore, it was not done to affect the commissions process, and it in fact does not.

There were two primary reasons why the charged individuals were moved to the same wing of Camp 5. First, JTFGTMO is consolidating detainee operations due to a variety of factors, including a reduction in personnel and the anticipation of opening the new detention facility, known as Camp 6, sometime later this year. Some camps are being shut down and others are being moved around. Moving the charged detainees to the same wing in Camp 5 helps manpower issues and makes for smoother camp operations.

Second, Joint Task Force Guantanamo is trying to comply with AR 190-47 and AR 190-8, and sound correctional doctrine which recommend separating various classes of detainees, such as keeping pre-trial detainees separate from others and keeping detainees separated based upon the seriousness of the charged offenses. While it can be said that all of the detainees are pre-trial, the fact that ten individuals have been charged changes the operational security for their care and custody. Consistent with AR 190-47 and AR 190-8 separating the group from the uncharged individuals increases the safety and security of the facilities for all detainees and allows more efficient operation of the guard force.

Michael J. Bumgarner
MICHAEL J. BUMGARNER

Colonel, United States Army
Commander, Joint Detention Group
Joint Task Force Guantanamo

Executed on: 06 April 2006

EXHIBIT "B"

From: Bogar, Thomas, LTC, DoD OGC
Sent: Monday, April 10, 2006 11:26
To: [REDACTED]
Subject: Detainee 753 - Abdul Zahir

LTC [REDACTED]

I represent Abdul Zahir, detainee 753. I would like to speak with COL Bumgarner regarding Camp V detention of my client. I have received and reviewed COL Bumgarner's affidavit and do have some questions as to suspected or known threats against my client.

Please advise how and when I may speak with COL Bumgarner.

TJB

Thomas J. Bogar, LTC, JA
Office of Military Commissions
Office of the Chief Defense Counsel
[REDACTED]

CONFIDENTIALITY NOTICE. The information contained in this e-mail and any accompanying attachments may constitute confidential, attorney-client information and work product which is legally privileged. This information is the property of the individual attorney and respective client. If you are not the intended recipient of this information, any disclosure, copying, distribution or the taking of any action in reliance on this information is strictly prohibited. If you received this e-mail in error, please notify us immediately by return e-mail or by calling [REDACTED]

EXHIBIT "C"

MessageFrom: [REDACTED] Mr, DoD OGC
Sent: Monday, April 10, 2006 10:47
To: Bogar, Thomas, LTC, DoD OGC
Subject: FW: Requests for Moves

LTC Bogar,

Below is the message I received this morning from LTC [REDACTED]

I have attached the affidavit that I mentioned to you from Col Bumgarner, USA, Commander, Joint Detention Group, JTF-GTMO. Although it mentions Khadr specifically in couple places - it is what Col Bumgarner will say if you talk to him. Let me know if you still want to talk to him.

[REDACTED]
-----Original Message-----

From: [REDACTED] M LTC USSOUTHCOM JTFGTMO
[mailto:[REDACTED]]
Sent: Monday, April 10, 2006 10:15
To: [REDACTED]
Subject: FW: Requests for Moves

FYI

-----Original Message-----

From: [REDACTED]
Sent: Friday, April 07, 2006 4:05 PM
To: Sullivan, Dwight H Col USSOUTHCOM JTFGTMO; Davis, Morris D Col USSOUTHCOM JTFGTMO
Cc: [REDACTED] COL USSOUTHCOM JTFGTMO
Subject: Requests for Moves

Sirs:

RDML Harris received a direct request from CPT Faulkner on 6 April to move ISN 694 from Camp 5 to Camp 4. RDML Harris is also aware of the motion from counsel on ISN 766 and the request from counsel for ISN 753.

Rest assured that the decision to move pre-commissions detainees to Camp 5 was an operational decision made by commanders based on Army Regulations and doctrine and sound correctional practices.

All aspects of Counsel's requests to move ISN 694 and ISN 753 from Camp 5 to Camp 4 were considered. The requests are denied.

Additionally, in the future, any such requests must be routed through the Joint Task Force Staff Judge Advocate.

V/R
LTC [REDACTED]

Hodges, Keith

From: [REDACTED] MAJ, DoD OGC [REDACTED]
Sent: Thursday, May 11, 2006 11:56 AM
To: 'Hodges, Keith'
Subject: RE: U.S. v. Abdul Zahir - Defense Reply to Government Response (Produce Witness, Duces Tecum)

Sir -

That one looks to be complete. Thank you!

V/R

[REDACTED]
Major, U.S. Army
Prosecutor
Office of Military Commissions
United States Department of Defense

-----Original Message-----

From: Hodges, Keith [REDACTED]
Sent: Thursday, May 11, 2006 11:39
To: [REDACTED] MAJ, DoD OGC
Subject: RE: U.S. v. Abdul Zahir - Defense Reply to Government Response (Produce Witness, Duces Tecum)

Dan,

I created the PDF directly as a Print function from Outlook. I did it. See attached. If still screwed up, you create the PDF, confirm it, and then send to me.

Thanks.

KHo

From: [REDACTED]
Sent: Thursday, May 11, 2006 11:10 AM
To: 'Hodges, Keith'
Cc: [REDACTED]

USSOUTHCOM JTFGTMO

Subject: RE: U.S. v. Abdul Zahir - Defense Reply to Government Response (Produce Witness, Duces Tecum)

Mr. Hodges -

The PDF version of the RE dropped roughly two paragraphs in the transition between pages 3 and 4 (part of the Prosecution Response).

V/R

[REDACTED]
Major, U.S. Army
Prosecutor
Office of Military Commissions
United States Department of Defense

-----Original Message-----

From: Hodges, Keith [REDACTED]
Sent: Thursday, May 11, 2006 10:56

To: [REDACTED]

Cc: [REDACTED]

Subject: RE: U.S. v. Abdul Zahir - Defense Reply to Government Response (Produce Witness, Duces Tecum)

This entire email thread has been added to the filings inventory as D 2. The corresponding RE is 31 and is attached.

From: Bogar, Thomas, LTC, DoD OGC [REDACTED]
Sent: Wednesday, May 10, 2006 10:25 AM
To: 'Hodges, Keith'
Cc: [REDACTED]

Subject: RE: U.S. v. Abdul Zahir - Defense Reply to Government Response (Produce Witness, Duces Tecum)

Mr. Hodges -

Kindly file the attached as the Defense Reply to the Government Response.

**OFFICE OF MILITARY COMMISSIONS
DEPARTMENT OF DEFENSE
U.S. NAVAL STATION, GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

: **DEFENSE MOTION**
: For Appropriate Relief - Produce

cost/time efficient means to review and produce said documents. The Government has not indicated whether producing such slides would cause the Government undue burden. Similarly, the Government has not indicated why such slides are not probative, when in fact they are probative to the very issue at hand, *to wit*, why the Movant was placed into Camp 5 and the decisions made thereto. See paragraph 3d to Defense Motion to Produce.

- l. Furthermore, although it is admitted the POM's do not specifically allow for a witness production *duces tecum*, in the same sense, the POMs do not forbid it either. In the absence of rules to the contrary, the commission should consider balancing the burden on the Government to produce this document verses the defense need for the document and its relevance.
- m. The Request to Produce this witness, *duces tecum*, is reasonable and should be granted, considering the following:
 - (1) The defense has agreed not to ask or visit the same areas previously asked of this witness as covered in *U.S. v. Barhoumi*, and the witness's affidavit;
 - (2) The defense agrees to close the proceedings when questioning broaches classified material;
 - (3) The defense will ask questions and visit areas not previously or sufficiently explored in the prior proceeding or the affidavit;
 - (4) The burden upon the Government to produce this witness, who is on the island and has custody and control of the subject slides, is *de minimus*, and the Government has failed to show by a preponderance of evidence, why a request to produce this witness, *duces tecum*, should be denied.
 - (5) The parties have exhausted more time and resources debating this issue, when in fact during this same time, the underlying Motion could have been argued and decided.

WHEREFORE, the Movant, Abdul Zahir, by and through his undersigned counsel, Moves for this Tribunal to ORDER the production of COL Bumgarner, *duces tecum*, and to testify during the 15 MAY 2006 Term for the Defense Motion for Appropriate Relief.

Very Respectfully,

/S/

THOMAS J. BOGAR
LTC, JA, USAR
Detailed Defense
Counsel for Abdul Zahir

Thomas J. Bogar, LTC, JA
Office of Military Commissions
Office of the Chief Defense Counsel

CONFIDENTIALITY NOTICE. The information contained in this e-mail and any accompanying attachments may constitute confidential, attorney-client information and work product which is legally privileged. This information is the property of the individual attorney and respective client. If you are not the intended recipient of this information, any disclosure, copying, distribution or the taking of any action in reliance on this information is strictly prohibited. If you received this e-mail in error, please notify us immediately by return e-mail or by calling [REDACTED]

-----Original Message-----

From: [REDACTED] MAJ, DoD OGC

Sent: Monday, May 08, 2006 17:16

To: [REDACTED]

Cc: [REDACTED]

Subject: RE: U.S. v. Abdul Zahir - Pros Resp to Def Motion (Produce Witness, Duces Tecum)

Col Chester -

The Prosecution response to the Defense submission follows below. The Prosecution will provide a separate response to the Defense Motion for Appropriate Relief - Transfer Accused to Camp IV.

1. Timeliness: This response is filed within the timeline established by the Presiding Officer (PO) for this motion, communicated by the Assistant to the Presiding Officers (APO).
2. Relief: The Defense motion to compel the production of COL Bumgarner *duces tecum* should be denied.
3. Overview:

a. The Defense requests the production of COL Bumgarner *duces tecum*. A subpoena *duces tecum* is alien to Commission practice. Production of witnesses is governed by Presiding Officer Memorandum (POM) 10-2. Production of documents is governed by a separate POM, POM 7-1, and the discovery orders issued by the PO. This response will address the Defense motion for a subpoena *duces tecum* as two separate motions under Commission law. First, whether the Defense has met its burden to show that the Prosecution should be compelled to produce the requested witness, COL Bumgarner. Second, whether the Defense has met its burden to show that the Prosecution should be compelled to produce the requested document, a PowerPoint briefing regarding the movement of detainees within the detention facilities onboard Guantanamo Bay Naval Station, Cuba (GTMO).

b. On the first motion, Defense failed to meet its burden to show that the Prosecution should be compelled to produce the requested witness under POM 10-2. Adequate alternative

forms of the witness' testimony already exist under paragraph 3c(6), POM 10-2. The witness prepared an affidavit dealing with the identical issue in the case of *US v. Khadr*, attached to the Defense Motion for Appropriate Relief - Transfer Accused to Camp IV. Further, the witness testified under oath on the identical issue in the case of *US v. Barhoumi*. The witness' testimony on the identical issue extends to 112 pages in the draft transcript of that case (attached to this response). The Defense's synopsis of the witness' expected testimony in its motion is not sufficiently detailed to demonstrate that new testimony would produce any relevant, non-cumulative evidence that is not already available in the affidavit and transcript. The only reference to potentially relevant new matters, that "the Defense intends to explore areas not previously questioned of this witness," is cryptic and purely speculative.

c. On the second motion, Defense failed to meet its burden to show that the Prosecution should be compelled to produce the requested PowerPoint briefing under POM 7-1. The PowerPoint presentation is not reasonably encompassed within the discovery orders issued by the PO in this case. There is no other binding law or authority that would require the Prosecution to produce this document. Under paragraph 5d, POM 7-1, where counsel for a party has requested access to a document from the opposing party "(other than pursuant to a discovery order), and access was denied," the requesting counsel must "cite the authority that requires opposing counsel to provide access," and, *inter alia*, "why ... counsel believes the requested evidence is necessary" in order to obtain an order from the PO compelling the opposing party to produce the document. The Defense's assertion that the Prosecution "will ... need to produce" the document is not a citation to authority.

d. The Defense motions to compel production of the requested witness and the requested document should be denied.

4. Facts:

a. On 3 January 2006, while the Accused was housed in Camp IV, he refused his evening meal, demanding to be transferred to Camp V. The Accused continued to periodically refuse meals.

b. Shortly after 29 March 2006, the Accused was transferred to Camp V.

c. On 6 April 2006, the requested witness, COL Bumgarner, prepared a sworn affidavit. The witness prepared the affidavit in response to a motion by the Defense in the case of *US v Khadr* that is virtually identical Defense Motion for Appropriate Relief - Transfer Accused to Camp IV in the present case. The affidavit addresses the operational decision by the Commander, Joint Task Force Guantanamo (JTF-GTMO) to move detainees charged before Military Commissions with offenses under the law of war out of the general population of unlawful combatants. The affidavit describes the policies underlying the decision, making reference to the standards of the body that certifies civilian detention facilities in the United States, the American Corrections Association, and Army Regulations (AR) 190-47 and 190-8. The affidavit makes clear that the operational decision by the commander was based upon sound detention policy.

d. On 26 April 2006, the requested witness testified under oath in the case of *US v. Barhoumi*. The witness testified on a motion by the Defense in the case of *US v Barhoumi* that is virtually identical Defense Motion for Appropriate Relief - Transfer Accused to Camp IV in the present case. The testimony of the requested witness extended over approximately 2 ½ hours, occupying 112 pages in the draft transcript of that session. The requested witness testified exhaustively regarding the operational decision by the Commander, JTF-GTMO to move detainees charged before Military Commissions with offenses under the law of war out of the general population of unlawful combatants. The testimony describes the physical facility of Camp V; the detention regimen in Camp V; the population, apart from the detainees charged before Military Commissions, housed in Camp V; the physical facility of Camp IV; the detention regimen in Camp IV; the population who were housed in Camp IV; the various bases for the classification of detainees; the scheduled closure of various facilities; the projected completion of Camp VI; the physical facility of Camp VI; leadership discretion and professional judgment in the determination of the appropriate placement of detainees within the facilities; the interplay of detainees' physical security and intelligence concerns; detainee behaviors; the complexities of scheduling detainee

activities; the policy basis of the decision by the Commander, JTF-GTMO to move detainees charged before Military Commissions out of the general population of unlawful combatants; the study and staffing of that decision; the use of PowerPoint to summarize that staffing for the Commander, JTF-GTMO; the content of that PowerPoint briefing, the "main focus of [which] was not about the Commissions"; reductions in the personnel strength of the guard force; the ability to safely manage Camp V with fewer personnel than the older camps, including Camp IV; the application of the Third Geneva Convention, AR 190-47 and AR 190-8; the requirement in AR 190-47 to separate "pretrial detainees" from the general population of a detention facility; the authority in AR 190-8 and the Third Geneva Convention to confine detainees subject to trial separately from those who are not subject to trial; the distinction between enemy combatants and pretrial detainees; that two detainees charged before Military Commissions are not presently housed in Camp V; that one of those detainees is not held in Camp V because an order from a Federal District Court arguably bars his transfer; that the other is not housed in Camp V for classified operational reasons; the risks associated with the mixing of detainees charged before Military Commissions and those who are not; that the movement of the detainees charged before Military Commissions was not motivated by an intent to inflict punishment or retaliation on those detainees; how detainees address concerns to the guard force and JTF-GTMO leadership; how those concerns are documented; how the guard force and leadership respond to those concerns; how the witness responded to a concern expressed by the accused in *Barhoumi*; details of prayer call; details of recreation; the recreational rotation; specific physical security concerns among and between those charged before Military Commissions; the mechanics of Defense Counsel visitation to a detainee housed at Camp V; that the Camp V process is identical to that employed in a Defense Counsel visitation to a detainee housed at Camp IV; that detainees have immediate access to their legal papers in their cells at Camp V; that security for a detainees legal papers is greater at Camp V than at Camp IV because other detainees are unable to access the papers; the movement of detainees charged before a Military Commissions was not intended to interfere with the attorney client relationship; that the location of a detainee in the facilities has no impact on the ability of a counsel to visit with an Accused; detainee methods for moving information among the various camps, including demands to be moved from camp to camp on pretext; the practical differences between Camp IV and V, from the point of view of a detainee; detainee communications with the International Committee of the Red Cross, habeas counsel and Commission counsel; that custodial matters are distinct from judicial matters; the lack of a defense counsel role in custodial decisions; and a variety of other issues.

e. On 30 April and 1 May 2006, while the Accused was housed in Camp V, he demanded to be transferred back to Camp IV, informing the guard force that he has refused various meals for that reason.

5. Legal Authority:

- a. DOD MCO # 1
- b. POM 10-2
- c. POM 7-1

6. Discussion:

a. The Defense requests the production of COL Bumgarner *duces tecum*. A subpoena *duces tecum* is alien to Commission practice. Production of witnesses is governed by Presiding Officer Memorandum (POM) 10-2. Production of documents is governed by a separate POM, POM 7-1, and the discovery orders issued by the PO. This response will address the Defense motion for a subpoena *duces tecum* as two separate motions under Commission law. First, whether the Defense has met its burden to show that the Prosecution should be compelled to produce the requested witness, COL Bumgarner. Second, whether the Defense has met its burden to show that the Prosecution should be compelled to produce the requested document, a PowerPoint briefing regarding the movement of detainees within the detention facilities onboard Guantanamo Bay Naval Station, Cuba (GTMO).

b. On the first motion, Defense failed to meet its burden to show that the Prosecution should be compelled to produce the requested witness under POM 10-2. Adequate alternative forms of the witness' testimony already exist under paragraph 3c(6), POM 10-2. The witness prepared an affidavit dealing with the identical issue in the case of *US v. Khadr*, attached to the Defense Motion for Appropriate Relief - Transfer Accused to Camp IV. Further, the witness testified under oath on the identical issue in the case of *US v. Barhoumi*. The witness' testimony on the identical issue lasted approximately 2 ½ hours and extends to 112 pages in the draft transcript of that case. An extensive factual record already exists on this matter that can be readily adduced into the record of this case.

c. The Defense's synopsis of the witness' expected testimony in its motion is not sufficiently detailed to demonstrate that new testimony would produce any relevant, non-cumulative evidence that is not already available in the affidavit and transcript. The Prosecution contests the following assertions made by the Defense in the motion below with regard to the production of the requested witness:

(1) In paragraph 3a, the Defense asserts that the witness "will need to expound upon his prior testimony as to why this particular detainee, Abdul Zahir, was moved to Camp V." The movement of the detainees charged before Military Commissions to Camp V was based upon general policy considerations, not the peculiarities of any individual detainee. Apart from the fact that the Accused demanded to move to Camp V, a demand that vitiates any assertion that the move as contrary to his desires, the peculiarities of the Accused's move are irrelevant to the Defense Motion for Appropriate Relief - Transfer Accused to Camp IV. The Defense asserts in paragraph 3a that that "the Defense intends to explore areas not previously questioned of this witness." While this is the only reference to potentially relevant new matters, it is "insufficiently detailed or ... cryptic," paragraph 3C(2), POM 10-2, and purely speculative. The remainder of the matters Defense indicates in paragraph 3a that it will explore are covered in great depth in the affidavit and testimony.

d. On the second motion, Defense failed to meet its burden to show that the Prosecution should be compelled to produce the requested PowerPoint briefing under POM 7-1. The PowerPoint presentation is not reasonably encompassed within the discovery orders issued by the PO in this case. There is no other binding law or authority that would require the Prosecution to produce this document. Under paragraph 5d, POM 7-1, where counsel for a party has requested access to a document from the opposing party "(other than pursuant to a discovery order), and access was denied," the requesting counsel must "cite the authority that requires opposing counsel to provide access," and, *inter alia*, "why ... counsel believes the requested evidence is necessary" in order to obtain an order from the PO compelling the opposing party to produce the document. The Defense's assertion that the witness "will ... need to produce" the document is not a citation to authority.

e. It might be inferred from the Defense motion that the basis for the motion to require production of the requested document is that it "would have probative value to a reasonable person," paragraph 6D(1), MCO #1. This admissibility test, however, must be read in conjunction with the remainder of MCO #1, as well as the implementing POMs. Paragraph 6D(3) of MCO #1 specifically authorizes the use of "other evidence ... including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements," and other matters. The small segment of the PowerPoint briefing that may have relevant and probative content is already described in greater detail in the witness' testimony, rendering the presentation cumulative. Under paragraph 6D(4) of MCO #1, the Commission may take conclusive notice of facts that are not subject to reasonable dispute. The small portion of the PowerPoint presentation that bears on the movement of detainees charged before Military Commissions would tend to prove facts that are not contested because they are not subject to reasonable dispute. The bulk of the briefing is neither relevant nor probative of any fact at issue bearing on the Defense Motion for Appropriate Relief - Transfer Accused to Camp IV.

f. The Prosecution contests the following assertions made by the Defense in the motion below with regard to the production of the requested document:

[REDACTED]

Subject: RE: U.S. v. Abdul Zahir - Defense Motion (Produce Witness, Duces Tecum)

Mr. Hodges -

Pursuant to POM 10-2, the Defense for the above-captioned matter files this Motion to Produce COL Bumgarner, *duces tecum*.

1. BACKGROUND FACTS:

- a. On or about 2 MAY 2006, the Defense filed a Notice of Intent to file a Motion for Appropriate Relief.
- b. On 3 MAY 2006, an 8-5 Conference call with the Presiding Officer, lead Prosecutor and the undersigned, was held regarding the substantive issues in the said Motion
- c. On 4 MAY 2006, the Defense filed a Motion for Appropriate Relief. (Subsequently filed as D1)
- d. On that day, a Request for Witnesses was sent to the lead Prosecutor.
- e. As part of the Motion, the Defense intends to call COL Bumgarner and Abdul Zahir.
- f. In addition, COL Bumgarner is requested to produce, *duces tecum*, certain power point slides (detailed below).
- g. In an email dated 4 MAY 2006, the Prosecution stated that it will not produce COL Bumgarner, nor the power point slides.
- h. The Defense now moves to Produce COL Bumgarner, *duces tecum*.

2. WITNESS NAME: Michael I. Bumgarner, COL, MP, USA; Joint Task Force Guantanamo Bay, Cuba.

3. SYNOPSIS OF EXPECTED TESTIMONY:

- a. This witness is expected to testify, *inter alia*, as to the differences in conditions between Camp 4 and Camp 5. He will have to clarify conditions and make justifications. He should also expound as to the reasons for segregating pre-trial detainees from other detainees. He will also need to expound upon his prior testimony as to why this particular detainee, Abdul Zahir, was moved to Camp 5. He will need to explain what factors (*to wit*, Federal guidelines, Army Regulations, risk factors, operational concerns) are considered prior to placing a detainee into a high-security facility prior to trial. The Defense intends to explore areas not previously questioned of this witness during *Barhoumi*. Finally, he will need to explain why two pre-trial detainees are held elsewhere while Abdul Zahir remains in Camp 5.^[1]
- b. Upon information and belief, this witness is the best available, most easily accessible, individual who can address these issues. The burden to the Government for producing this witness, *duces tecum*, is *de minimus*.
- c. The undersigned had tried to schedule a teleconference with this witness, as per the underlying Motion (See Exhibit "B" to Motion for Relief), but that request was apparently denied, thus prompting this

Motion.

- d. COL Bumgarner will also need to produce certain power point slides which, based upon the information and belief, the slides will provide insight into the decision making process to move the pre-commission detainees to Camp 5. These slides were apparently used to brief the JTF commander on the necessity of moving the pre-commission detainees to Camp 5. Given the fact that there are apparently other reasons to move pre-commission detainees to varying camps, the slides might prove useful in determining what, if any, factors were used in making the decision. These slides are apparently readily available and are not voluminous. COL Bumgarner testified that he believes they are on the computer of his S-3. It will not cause the Government any undue burden, time, or effort to produce such slides. Discussion as to the slides was made during the *U.S. v. Barhoumi*, but said slides were never produced.
4. SOURCE OF REQUESTOR'S KNOWLEDGE:
 - a. As set out in the underlying Motion, the Witness has prepared an Affidavit (See Exhibit "A").
 - b. The witness has also testified as to similar issues in *U.S. v. Barhoumi*. However, that matter was litigated by a different defense counsel, before a different Presiding Officer, opposed by a different Prosecutor, where the basis for the Motion was different. None of the requisite elements underlying the principal for collateral estoppel are remotely present here. The only similarity between the cases is similarity of the witness. As such, the Government's rejection to produce said witness is baseless.
 - c. As indicated above and per the Motion, a request to interview the witness was denied.
5. PROPOSED USE OF THE TESTIMONY: The Defense intends to offer said testimony in support of the underlying Motion. The Defense is reluctant to provide any further detail for concern of witness taint.
6. THIS WITNESS IS AVAILABLE: The witness is available, and there is no evidence to the contrary.
7. ALTERNATIVE FORMS OF TESTIMONY:
 - a. The undersigned will make every reasonable effort not to ask the same questions previously asked of this witness in the *U.S. v. Barhoumi*. However, the Defense will use answers provided by the witness in *U.S. v. Barhoumi* and in his Affidavit to ask follow up questions. To do so, the Defense may need to restate the question.
 - b. Questions will be addressed to the Witness "as of cross".
 - c. Considering the ebb and flow of cross examination, additional matters may be elicited from this witness that the Defense does not now anticipate, but may certainly be relevant to the underlying Motion. As such, it is important for this witness to testify live.

8. ADDITIONAL WITNESSES: The Defense is unaware of any substitute witnesses and the Government has failed to indicate otherwise.

WHEREFORE the Defense prays that this Honorable Tribunal issue an ORDER to Produce COL Bumgarner, *duces tecum*, to testify during the 15 MAY 2006 Term on behalf of the Defense Motion for Appropriate Relief.

Very Respectfully,

/S/

THOMAS J. BOGAR
LTC, JA, USAR
Detailed Defense
Counsel for Abdul Zahir


CERTIFICATE OF SERVICE

I certify that on 8 MAY 2006 a true and correct copy of the forgoing Motion was sent via electronic mail delivery to all counsel of record and to the Assistant Presiding Officer with a copy to the Presiding Officer.

/S/

THOMAS J. BOGAR
LTC, JA
Defense Counsel
Detailed Defense
Counsel for Abdul Zahir

*Thomas J. Bogar, LTC, JA
Office of Military Commissions
Office of the Chief Defense Counsel*



CONFIDENTIALITY NOTICE. The information contained in this e-mail and any accompanying attachments may constitute confidential, attorney-client information and work product which is legally privileged. This information is the property of the individual attorney and respective client. If you are not the intended recipient of this information, any disclosure, copying, distribution or the taking of any action in reliance on this information is strictly prohibited. If you received this e-mail in error, please notify us immediately by return e-mail or by calling [REDACTED]

-----Original Message-----

From: Hodges, Keith [REDACTED]
Sent: Thursday, May 04, 2006 20:41
To: [REDACTED]
Cc: [REDACTED]

Subject: RE: U.S. v. Abdul Zahir - Defense Motion (Relief from Pre-Trial Confinement)

1. Defense, the government has triggered paragraphs 2 b and 3b below.
2. Prosecution, keep all advised of COL B's availability and have him prepared to testify during the term. If the slides exist, have him preserve them.
3. The Presiding Officer will rule or conference once he receives the submissions as described in the APOs email of 4 May 06.
4. The Presiding Officer desires the parties to know that he did not hear COL B testify, and has not read the transcript of COL B's testimony.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[REDACTED]

From: [REDACTED]
Sent: Thursday, May 04, 2006 4:33 PM
To: 'Hodges, Keith'
Cc: [REDACTED]

Subject: RE: U.S. v. Abdul Zahir - Defense Motion (Relief from Pre-Trial Confinement)

Sir -

We are awaiting word from JTF-GTMO whether COL Michael I. Bumgarner (COL B) is available. Moreover, the Government does not intend to produce the requested witness, COL B. An alternative to live testimony already exists under para. 4b of POM 10-2, in the form of the affidavit attached to the defense motion (prepared for the case of *U.S. v. Khadr*) and the 112 pages of COL B's testimony in the case of *U.S. v. Barhoumi*. See *Barhoumi* draft transcript pages 44 through 155. Live testimony by COL B will not add to this record in any meaningful way.

We are awaiting word from JTF-GTMO whether PowerPoint slides COL B referenced during the hearing for *U.S. v. Barhoumi* on 26 April 2006 still exist. Moreover, the Government does not intend to produce the PowerPoint slides COL B referenced during the hearing for *U.S. v. Barhoumi* on 26 April 2006. COL B described the slide extensively in his testimony (see *Barhoumi* draft transcript, pages 72 through 76). The PowerPoint presentation is predecisional advice to the Commander, part of the Commander's deliberative process (pages 72 through 75). The body of the PowerPoint presentation, as described by COL B in his testimony, deals with sensitive operational matters that are not relevant to the commission detainees (pages 74 and 75). Further, the considerations relevant to the commission detainees are described extensively in the affidavit and the testimony. Finally, the PowerPoint slides are beyond the scope of the discovery order issued under POM 7-1.

The Government will request that the Presiding Officer (PO) deny this motion on its face. It is the movant's burden to show that relief is warranted. The facts alleged in the defense motion, even if true, do not warrant relief.

V/R



CAUTION: This message may contain information protected by the attorney-client, attorney work product, deliberative process, or other privilege. Do not disseminate without the approval of the Office of the DoD General Counsel.

-----Original Message-----

From: Hodges, Keith [mailto: [REDACTED]]
Sent: Thursday, May 04, 2006 13:27
To: Bogar, Thomas, LTC, DoD OGC; Hodges, Keith
Cc: [REDACTED]

Subject: RE: U.S. v. Abdul Zahir - Defense Motion (Relief from Pre-Trial Confinement)

All counsel: Please note the special instructions in paragraphs 2 and 3 below.

1. The motion attached to the below email has been placed on the filings inventory as D 1. The corresponding RE is 30.

2. The defense motion stated, "The Movant requests the following witnesses be produced and be present for this motion: a. Michael I. Bumgarner, COL, MP, USA. " As POM 4-3 states, stating the need for a witness in a motion is NOT a request for a witness. Witness are requested using POM 10-2. In the interests of time and because a similar motion has been litigated using the same witness, the Presiding Officer has approved the following, expedited procedures:

a. NLT 1200, 5 May, the government will advise all parties, the APO, and the PO if COL Bumgarner is available and will be produced. If so, the defense need not comply with POM 10-2.

b. If the witness is not available or the government will not produce the witness, that fact will be communicated, with the reasons therefore, to all parties, the APO, and the PO. If the defense still desires the witness, they will file a motion with the Presiding Officer using the format of POM 10-2 NLT 1200, 8 May. The Prosecution will respond NLT 1200, 9 May.

3. The defense motion also stated "Defense specifically requests that COL Bumgarner bring with him a copy (paper print out) of the Powerpoint slides he referenced during the hearing for *U.S. v. Barhoumi* on 26 April 2006." Requests for access to witness is addressed in POM 7-1. In the interests of time and because a similar motion has been litigated using the same witness, the Presiding Officer has approved the following, expedited procedures:

a. NLT 1200, 5 May, the government will advise all parties, the APO, and the PO if the requested slides are available and will be produced. If so, the defense need not comply with POM 7-1.

b. If the slides are not available or the government will not produce them, that fact will be communicated, with the reasons therefore, to all parties, the APO, and the PO. If the defense still desires the slides, they will file a motion with the Presiding Officer using the format of POM 7-1 NLT 1200, 8 May. The Prosecution will respond NLT 1200, 9 May.

4. The procedures set out above may be contained in the body of an email, but the contents of the requests will comply with POM 10-2 or 7-1 as appropriate.

Any questions, ask NOW please.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission

From: Bogar, Thomas, LTC, DoD OGC [REDACTED]

Sent: Thursday, May 04, 2006 11:23 AM

To: [REDACTED]

Cc: [REDACTED]

Subject: RE: U.S. v. Abdul Zahir - Defense Motion (Relief from Pre-Trial Confinement)

Mr. Hodges -

Attached please find Defense Motion for Relief. Please ensure the same is promptly docketed and filed accordingly.

V/R

TJB

*Thomas J. Bogar, LTC, JA
Office of Military Commissions
Office of the Chief Defense Counsel*

CONFIDENTIALITY NOTICE. The information contained in this e-mail and any accompanying attachments may constitute confidential, attorney-client information and work product which is legally privileged. This information is the property of the individual attorney and respective client. If you are not the intended recipient of this information, any disclosure, copying, distribution or the taking of any action in reliance on this information is strictly prohibited. If you received this e-mail in error, please notify us immediately by return e-mail or by calling [REDACTED]

-----Original Message-----

From: Bogar, Thomas, LTC, DoD OGC

Sent: Tuesday, May 02, 2006 09:25

To: [REDACTED]

Cc: [REDACTED]

[REDACTED]

Subject: U.S. v. Abdul Zahir - Notice of Intent to File Motion

Mr. Hodges -

Attached please find a Notice of Intent to File a Motion (For Appropriate Relief - Transfer Accused to Camp IV). The defense has spoken with opposing counsel regarding same. I intend to file this motion by COB 4 May 2006.

I have submitted a request to COL Chester requesting an 8-5 Conference regarding this issue, the scheduling thereof, and to advise the Court of one additional matter. Again, opposing counsel and I have discussed these issues already. Please advise as to the status of the 8-5 as I am not sure if COL Chester received the email since I sent it to his new address. Note that this is sent to both is USMC and Hughes.net addresses.

V/R

TJB

*Thomas J. Bogar, LTC, JA
Office of Military Commissions
Office of the Chief Defense Counsel*

[REDACTED]

CONFIDENTIALITY NOTICE. The information contained in this e-mail and any accompanying attachments may constitute confidential, attorney-client information and work product which is legally privileged. This information is the property of the individual attorney and respective client. If you are not the intended recipient of this information, any disclosure, copying, distribution or the taking of any action in reliance on this information is strictly prohibited. If you received this e-mail in error, please notify us immediately by return e-mail or by calling [REDACTED]

[REDACTED]

[1] In fact, in his Order of 28 APR 2006, CAPT O'Toole specifically stated that "Counsel could have continued to pursue with this witness the reasons why these pre-commission detainees were being treated differently from the others, even if classified information were necessary in the case of the latter." See Paragraph 6 to Order dated 4/28/06, attached RE51.

1 The Commissions Hearing was called to order at 0903, 26
2 April 2006.

3

4 [Throughout this transcript, Captain Daniel O'Toole, U.S.
5 Navy, will be referred to as the Presiding Officer or PO.
6 Captain [REDACTED] U.S. Air Force, will be referred to
7 as the Prosecutor or PROS. Lieutenant [REDACTED]
8 Jr., U.S. Navy Reserve, will be referred to as Assistant
9 Prosecutor or APROS. Captain Wade Faulkner, U.S. Army,
10 will be referred to as Defense Counsel or DC.]

11

12 **PRESIDING OFFICER:** The Military Commission is called to
13 order. Before continuing, let me note that the
14 accused is seated at the defense table. He is
15 not wearing his headphones, however, I note that
16 the defense translator is wearing headphones.

17

18 Sir, is the broadcast coming through? I note
19 that the accused is now wearing his headphones.

20

21 Mr. Barhoumi, are you able to hear and understand
22 the translation?

23

1 **ACC:** Currently, it is good.

2

3 **Presiding Officer:** Thank you. Captain Faulkner, I note
4 that at our last session Mr. Barhoumi asked to be
5 represented by Mr. Foreman and Mr. Foreman is not
6 present today. Can you inform me as to Mr.
7 Foreman's status?

8

9 **DC:** Yes, sir. He submitted an application to the
10 Chief Defense Counsel shortly after the last
11 session. As recently as, I believe it was
12 Wednesday of last week, he still had not been
13 granted an interim security clearance and was
14 therefore unable to accompany me on this trip.

15

16 **Presiding Officer:** Well, given his absence today, what is
17 the defense position with respect to the matters
18 that were scheduled for disposition today?

19

20 **DC:** Sir, the defense would request that we defer voir
21 dire, and the motion to abate the proceedings, as
22 well as the motion for modification of the
23 discovery order, and that the defense be allowed

1 to proceed with the motion concerning the
2 movement of Mr. Barhoumi from Camp Four to Camp
3 Five.

4
5 **Presiding Officer:** Thank you. Mr. Barhoumi, at our last
6 session, I advised you of your right to be
7 represented before this Commission by qualified
8 counsel. Let me review those rights with you
9 now.

10
11 Pursuant to Military Commission Order Number 1,
12 Captain Faulkner, who is a military lawyer, has
13 been assigned to represent you as your detailed
14 defense counsel. You may also request a
15 different military lawyer to represent you. If
16 the military lawyer you request is reasonably
17 available, that lawyer would also be appointed to
18 represent you. Detailed defense counsel are
19 provided to you at no cost to you.

20
21 In addition, you may be represented by a civilian
22 counsel, however, a civilian lawyer would

1 represent you at no expense to the United States
2 and he would have to be qualified.

3

4 At our last session I understood your request to
5 be represented by Mr. Lee Foreman. I also
6 understand that Mr. Foreman has agreed to
7 represent you, that he has applied for a secret
8 clearance in order to be qualified to represent
9 you.

10

11 Your detailed defense counsel has advised that
12 Mr. Foreman's security clearance is being
13 processed but was not approved in time for him to
14 be here today. Is this also your understanding?

15

16 **ACC:** Yes.

17

18 **Presiding Officer:** Thank you. Do you understand that if
19 Mr. Foreman represents you once his clearance is
20 granted, that your detailed defense counsel will
21 also continue to represent you and your detailed
22 defense counsel will be present during the

1 presentation of all the evidence. Do you
2 understand what I have just told you?
3

4 **ACC:** Yes.

5

6 **Presiding Officer:** Thank you. Do you have any questions
7 about your rights to counsel before this
8 Commission?
9

10 **ACC:** Currently, I don't have.

11

12 **Presiding Officer:** Do you still wish to be represented by
13 Mr. Foreman?
14

15 **ACC:** Yes.

16

17 **Presiding Officer:** At our last session, you told me that
18 you would like more time to work with Captain
19 Faulkner before you accept him as your detailed
20 defense counsel. Since our last session, have
21 you had the opportunity to speak with Captain
22 Faulkner about matters that are important to you
23 regarding these proceedings?

1

2 **ACC:** I had some time but it was a little time.

3

4 **Presiding Officer:** Do you also wish to be represented by

5 Captain Faulkner as your detailed defense

6 counsel?

7

8 **ACC:** To me it is all good.

9

10 **Presiding Officer:** Do I understand that you would like

11 Captain Faulkner to be your detailed defense

12 counsel?

13

14 **ACC:** Yes.

15

16 **Presiding Officer:** Do you wish to be represented by any

17 other counsel other than Mr. Foreman and Captain

18 Faulkner?

19

20 **ACC:** I spoke with him and I know the procedure. He

21 knows what I want.

22

1 **Presiding Officer:** Captain Faulkner, in view of your
2 client's desire to be represented by you and Mr.
3 Foreman, are you ready to proceed with the
4 reading of the charges this morning?

5
6 **DC:** Yes, sir.

7
8 **Presiding Officer:** Very well.

9
10 **APROS:** Jurisdiction for this Military Commission is
11 based on the President's determination of July
12 6th, 2004 that Sufyian Barhoumi (a/k/a/ Abu
13 Obaida a/k/a/ Ubaydah Al Jaza'iri a/k/a/ Shafiq
14 hereinafter "Barhoumi") is subject to his
15 Military Order of November 13, 2001.

16
17 The charged conduct alleged against Barhoumi is
18 triable by a military commission.

19
20 General Allegations: Al Qaida ("the Base"), was
21 founded by Usama bin Laden and others in or about
22 1989 for the purpose of opposing certain

1 governments and officials with force and
2 violence.

3
4 Usama bin Laden is recognized as the emir (prince
5 or leader) of al Qaida.

6
7 A purpose or goal of al Qaida, as stated by Usama
8 bin Laden and other al Qaida leaders, is to
9 support violent attacks against the property and
10 nationals (both military and civilian) of the
11 United States and other countries for the purpose
12 of, inter alia, forcing the United States to
13 withdraw its forces from the Arabian Peninsula
14 and in retaliation for U.S. support of Israel.

15
16 Al Qaida operations and activities are directed
17 by a shura (consultation) council composed of
18 committees, including: political committee;
19 military committee; security committee; finance
20 committee; media committee; and religious/legal
21 committee.

1 Between 1989 and 2001, al Qaida established
2 training camps, guest houses, and business
3 operations in Afghanistan, Pakistan, and other
4 countries for the purpose of training and
5 supporting violent attacks against property and
6 nationals (both military and civilian) of the
7 United States and other countries.

8
9 In 1992 and 1993, al Qaida supported violent
10 opposition of U.S. property and nationals by,
11 among other things, transporting personnel,
12 weapons, explosives, and ammunition to Yemen,
13 Saudi Arabia, Somalia, and other countries.

14
15 In August 1996, Usama bin Laden issued a public
16 "Declaration of Jihad Against the Americans," in
17 which he called for the murder of U.S. military
18 personnel serving on the Arabian peninsula.

19
20 In February 1998, Usama bin Laden, Ayman al
21 Zawahiri, and others, under the banner of
22 "International Islamic Front for Fighting Jews
23 and Crusaders," issued a fatwa (purported

1 religious ruling) requiring all Muslims able to
2 do so to kill Americans, whether civilian or
3 military, anywhere they can be found and to
4 "plunder their money."
5

6 On or about May 29, 1998, Usama bin Laden issued
7 a statement entitled "The Nuclear Bomb of Islam,"
8 under the banner of the "International Islamic
9 Front for Fighting Jews and Crusaders," in which
10 he stated that "it is the duty of Muslims to
11 prepare as much force as possible to terrorize
12 the enemies of God."
13

14 Since 1989 members and associates of al Qaida,
15 known and unknown, have carried out numerous
16 terrorist attacks, including, but not limited to:
17 the attacks against the American Embassies in
18 Kenya and Tanzania in August 1998; the attack
19 against the U.S.S. COLE in October 2000; and the
20 attacks on the United States on September 11,
21 2001.
22

1 Charge: Conspiracy: Sufyian Barhoumi, Jabran
2 Said bin al Qahtani, and Ghassan al Sharbi, in
3 the United States, Afghanistan, Pakistan, and
4 other countries, from on or about January 1996 to
5 on or about March 2002, willfully and knowingly
6 joined an enterprise of persons who shared a
7 common criminal purpose and conspired and agreed
8 with Usama bin Laden (a/k/a Abu Abdullah), Saif
9 al Adel, Dr. Ayman al Zawahiri (a/k/a "the
10 Doctor"), Muhammad Atef (a/k/a Abu Hafs al
11 Masri), Zayn al Abidin Muhammad Husayn (a/k/a/
12 Abu Zubayda, hereinafter "Abu Zubayda"), Binyam
13 Muhammad, Noor al Deen, Akrama al Sudani and
14 other members and associates of the al Qaida
15 organization, known and unknown, to commit the
16 following offenses triable by military
17 commission: attacking civilians; attacking
18 civilian objects; murder by an unprivileged
19 belligerent; destruction of property by an
20 unprivileged belligerent; and terrorism.

21
22 In furtherance of this enterprise and conspiracy,
23 al Sharbi, Barhoumi, al Qahtani, Abu Zubayda,

1 Binyam Muhammad, Noor al Deen, Akrama al Sudani,
2 and other members or associates of al Qaida
3 committed the following overt acts:
4

5 In 1998 Barhoumi, an Algerian citizen, attended
6 the electronics and explosives course at Khalden
7 Camp in Afghanistan, an al Qaida-affiliated
8 training camp, where he received training in
9 constructing and dismantling electronically-
10 controlled explosives.
11

12 After completing his training, Barhoumi became an
13 explosives trainer for al Qaida, training members
14 of al Qaida on electronically-controlled
15 explosives at remote locations.
16

17 **Presiding Officer:** Lieutenant, let me interrupt and ask
18 you to slow down just a bit for the translator.
19

20 **APROS:** Yes, sir.
21

22 **Presiding Officer:** Thank you.
23

1 **APROS:** In or about August 2000, al Sharbi, a Saudi
2 citizen and Electrical engineering graduate of
3 Embry Riddle University, in Prescott, Arizona,
4 departed the United States in search of terrorist
5 training in Afghanistan.

6
7 In July 2001, Muhammad Atef (a/k/a/ Abu Hafs al
8 Masri), the head of al Qaida's military committee
9 and al Qaida's military commander, wrote a letter
10 to Abu Muhammad, the emir of al Qaida's al Farouq
11 Camp, asking him to select two "brothers" from
12 the camp to receive electronically-controlled
13 explosives training in Pakistan, for the purpose
14 of establishing a new and independent section of
15 the military committee.

16
17 In July 2001, al Sharbi attended the al Qaida-run
18 al Farouq training camp, where he was first
19 introduced to Usama bin Laden. At al Farouq, al
20 Sharbi's training included, inter alia, physical
21 training, military tactics, weapons instruction,
22 and firing on a variety of individual and crew-
23 served weapons.

1
2 During July and August 2001, al Sharbi stood
3 watch with loaded weapons at al Farouq at times
4 when Usama bin Laden visited the camp.
5

6 From July 2001 to September 13, 2001, al Sharbi
7 provided English translation for another camp
8 attendee's military training at al Farouq, to
9 include translating the attendee's personal bayat
10 ("oath of allegiance") to Usama bin Laden.
11

12 On or about September 13, 2001, anticipating a
13 military response to al Qaida's attacks on the
14 United States of September 11th, 2001, al Sharbi
15 and the remaining trainees were ordered to
16 evacuate al Farouq. Al Sharbi and others fled
17 the camp and were told to fire warning shots in
18 the air if they saw American missiles
19 approaching.
20

21 Shortly after the September 11 2001 attacks on
22 the United States, al Qahtani, a Saudi citizen
23 and Electrical engineering graduate of King Saud

1 University in Saudi Arabia, left Saudi Arabia
2 with the intent to fight against the Northern
3 Alliance and American Forces, whom he expected
4 would soon be fighting in Afghanistan.

5
6 In October 2001, al Qahtani attended a newly
7 established terrorist training camp North of
8 Kabul, where he received physical conditioning,
9 and training in the PK Machine gun and AK-47
10 assault rifle.

11
12 Between late December 2001 and the end of
13 February 2002, Abu Zubayda, a high-ranking al
14 Qaida recruiter and operational planner, assisted
15 in moving al Sharbi, al Qahtani and Binyam
16 Muhammad from Birmel, Afghanistan to a guest
17 house in Faisalabad, Pakistan where they would
18 obtain further training.

19
20 By early March 2002, Abu Zubayda, Barhoumi, al
21 Sharbi, al Qahtani, and Binyam Muhammad had all
22 arrived at the guesthouse in Faisalabad,
23 Pakistan. Barhoumi was to train al Sharbi, al

1 Qahtani and Binyam Muhammad in building small,
2 hand-held remote-detonation devices for
3 explosives that would later be used in
4 Afghanistan against United States forces.

5
6 In March 2002, after Barhoumi, al Sharbi and al
7 Qahtani had all arrived at the guesthouse, Abu
8 Zubayda provided approximately \$1,000 U.S.
9 Dollars for the purchase of components to be used
10 for training al Sharbi and al Qahtani in making
11 remote-detonation devices.

12
13 Shortly after receiving the money for the
14 components, Barhoumi, Noor al Deen and other
15 individuals staying at the house went into
16 downtown Faisalabad with a five page list of
17 electrical equipment and devices for purchase
18 which included, inter alia, electrical resistors,
19 plastic resistors, light bulbs for circuit board
20 lights, plastic and ceramic diodes, circuit
21 testing boards, an ohmmeter, watches, soldering
22 wire, soldering guns, wire and coil, six cell

1 phones of a specified model, transformers and an
2 electronics manual.

3
4 After purchasing the necessary components, al
5 Qahtani and al Sharbi received training from
6 Barhoumi on how to build hand-held remote-
7 detonation devices for explosives while at the
8 guest house.

9
10 During March 2002, after his initial training, al
11 Qahtani was given the mission of constructing as
12 many circuit boards as possible with the intent
13 to ship them to Afghanistan to be used as timing
14 devices in bombs.

15
16 After their training was completed and a
17 sufficient number of circuit boards were built,
18 Abu Zubayda had directed that al Qahtani and al
19 Sharbi were to return to Afghanistan in order to
20 use, and to train others to construct remote-
21 control devices to detonate car bombs against
22 United States forces.

1 During March 2002 al Qahtani wrote two
2 instructional manuals on assembling circuit
3 boards that could be used as timing devices for
4 bombs and other improvised explosive devices.

5
6 On March 28, 2002, Barhoumi, al Sharbi, al
7 Qahtani, Abu Zubayda and others were captured in
8 a safe house in Faisalabad after authorities
9 raided the home.

10

11 **Presiding Officer:** Thank you.

12

13 **APROS:** Yes, sir.

14

15 **Presiding Officer:** Lieutenant, correct me if I am wrong,
16 but I don't believe when we opened this morning
17 we announced whether all the parties were
18 present.

19

20 **APROS:** We didn't, and all parties that were previously
21 present when the Commission recessed are again
22 present, sir.

23

1 **Presiding Officer:** Thank you. Captain Faulkner, in view
2 of your client's specific request to be
3 represented by Mr. Foreman, both at our last
4 session and this morning, and in view of Mr.
5 Foreman's substantial steps towards
6 representation, I am confident that he will, in
7 fact, join the defense team, so I will allow you
8 to defer at your request, the voir dire and
9 challenges of the Presiding Officer.

10

11 I would, however, like to cover protective
12 orders. Do counsel for both sides understand the
13 provisions of Military Commission Order Number 1,
14 which governs protected information?

15

16 **APROS:** The government does, sir.

17

18 **DC:** Yes, sir.

19

20 **Presiding Officer:** And do you understand that you must, as
21 soon as practicable, notify me of any intent to
22 offer evidence involving protected information so

1 that I may consider the need to close the
2 proceedings?

3

4 **APROS:** Yes, sir.

5

6 **DC:** Yes, sir.

7

8 **Presiding Officer:** Thank you. Is there any issue related
9 to the protection of witnesses that should be
10 taken up at this time, as may be necessary, to
11 discuss and litigate motions or conduct other
12 business before the Commission today?

13

14 **APROS:** Yes, sir. I believe that the Colonel that is
15 about to testify in one of the motions, his last
16 name will not revealed in open court and his
17 first initial of his last name will be used
18 instead.

19

20 **Presiding Officer:** Very well. Is the defense aware of
21 that?

22

23 **DC:** Yes, sir.

1

2 **Presiding Officer:** Any objection to that?

3

4 **DC:** No, sir.

5

6 **Presiding Officer:** Any other matters with respect to the
7 protection of witnesses?

8

9 **APROS:** Not from the government, sir.

10

11 **DC:** No, sir.

12

13 **Presiding Officer:** As I am required by Military Commission
14 Order Number 1 to consider the safety of
15 witnesses and others at these proceedings, do
16 counsel understand that they must notify me of
17 any issue regarding the safety of potential
18 witnesses so that I may determine the appropriate
19 way in which testimony will be received and
20 witnesses protected?

21

22 **APROS:** Yes, sir.

23

1 **DC:** Yes, sir.

2

3 **Presiding Officer:** Thank you. Now the only protective
4 orders of which I am aware are Protective Orders
5 1, 2, and 3(a), which have been marked RE 15, 16,
6 and 46. Now have both sides seen these
7 protective orders?

8

9 **APROS:** The prosecution has, sir.

10

11 **DC:** Yes, sir.

12

13 **Presiding Officer:** Are counsel aware of any other
14 protective orders other than those three?

15

16 **APROS:** The prosecution is aware of none, sir.

17

18 **DC:** No, sir.

19

20 **Presiding Officer:** Thank you. All current presiding
21 officer memoranda, as listed on the review
22 exhibits and any other subsequent modifications

1 of them are in effect as rules of court for this
2 Commission and that would be RE 27.

3

4 The current filings inventory has been marked RE
5 45. Do counsel for both sides agree that that is
6 an accurate reflection of the filings, the
7 motions, responses, and replies filed to date?

8

9 **APROS:** Yes, sir.

10

11 **DC:** Yes, sir.

12

13 **Presiding Officer:** Thank you. At this time, well let me
14 approach it this way. Captain Faulkner, you
15 filed several motions; a motion to abate
16 proceedings, at RE 19; a motion opposing the
17 discovery order, at RE 37; a motion for relief
18 from the accused's transfer to Camp 5, at RE 38.
19 Does the defense have any additional matters that
20 constitute motions or any other motions you care
21 to make today?

22

23 **DC:** No, sir.

1

2 **Presiding Officer:** And once again, at your request, I will
3 allow you to defer consideration of those
4 motions, if you'd like to; but I believe you told
5 me you would like to proceed with the motion for
6 relief from the accused's transfer. Is that
7 right?

8

9 **DC:** That's correct, sir.

10

11 **Presiding Officer:** Very well. I'll allow you to proceed
12 with that. You may proceed.

13

14 **DC:** Sir, the defense calls Colonel B.

15

16 **Presiding Officer:** Very well. Where is the witness
17 located?

18

19 **APROS:** He's upstairs, sir. My understanding is the
20 bailiff will make arrangements to bring the
21 Colonel in.

22

1 **Presiding Officer:** Do we need to take a brief recess to do
2 that?

3

4 **APROS:** I don't believe so, sir.

5

6 **Presiding Officer:** Very well. We'll just stand in place.

7 Thank you.

8

9 **COLONEL M.B, U.S. Army, was called as a witness for the**
10 **defense, was sworn, and testified as follows:**

11

12 **APROS:** For the record, can you, please, state your rank
13 and the first initial of your last name?

14

15 **WIT:** I'm Colonel first initial is M.

16

17 **APROS:** And you're current billet here at JTF, GTMO, sir?

18

19 **WIT:** I'm the commander of the Joint Detention Group.

20

21 **Presiding Officer:** I'm sorry, Lieutenant, you requested
22 the first initial of his last name, the witness
23 gave the first initial----

1

2 **WIT:** Oh, I'm sorry.

3

4 **Presiding Officer:** ----of his first name.

5

6 **APROS:** I'm sorry.

7

8 **WIT:** First initial of last name is B, bravo.

9

10 **Presiding Officer:** Thank you.

11

12 **APROS:** Yes, sir.

13

14 **Presiding Officer:** Captain Faulkner, you may proceed.

15

16 **DC:** Thank you, sir.

17

18 Colonel B. you're the same Colonel B. that

19 provided an affidavit on April the 6th, 2006

20 regarding the transfer of the Pre-Commission

21 detainees to Camp 5?

22

23 **WIT:** Yes, that's correct.

1

2 **DC:** Sir, if you could, please, describe for us the
3 conditions at Camp 5?

4

5 **WIT:** Camp 5 is a maximum security facility. It's
6 modeled after a federal prison in Miami, Indiana.
7 It houses--it has the capacity to hold up to 100
8 individuals. Each cell is a closed cell,
9 concrete, it has a metal door. It has a view
10 port. It has a bean hole to which we shackle the
11 hands.

12

13 **Presiding Officer:** Let me interrupt you for just a minute
14 while we reposition the microphone. I don't
15 believe you're being picked up.

16

17 **WIT:** Okay.

18

19 **DC:** And, sir, I've been made aware that there was no-
20 -there hasn't been any translation of the
21 response to my question.

22

1 **Presiding Officer:** Okay. Well, then, let's back up and
2 Colonel, if you can, to the extent you can pace
3 your responses so the translators can translate
4 them for----

5
6 **WIT:** Yes, sir.

7
8 **Presiding Officer:** ----for the accused.

9
10 Captain Faulkner, let me ask you to start again,
11 please.

12
13 **DC:** Sir, you are the same Colonel B. who provided an
14 affidavit on April 6th 2006, regarding the
15 movement of the Pre-Commission detainees to Camp
16 5?

17
18 **WIT:** Yes, I am.

19
20 **DC:** And if you could, sir, please, for us describe
21 the conditions at Camp 5?

22

1 **WIT:** Camp 5 is a maximum security facility. It has
2 the capacity to house up to 100 detainees. It is
3 constructed with four separate wings with two
4 tiers, i.e. two levels, a bottom floor and a top
5 floor. The cells are closed-in cells of a
6 concrete fabrication. They have a metal door.
7 That door has a view port. It has a what we
8 describe as a bean hole or a port which can be
9 opened through which the detainee can place their
10 hands to be shackled and/or through which we
11 conduct transactions, i.e. pass food,
12 medications, linen.

13
14 It has, inside of each cell, there are--there is
15 a bunk--a metal bunk. There is a latrine, a
16 western-style toilet. It has a water fountain.
17 There's a shower facility at the end of each
18 hallway.

19
20 There are two rec yards. Those rec yards consist
21 of what we refer to as pens, enclosed areas of a
22 wire fencing that you--normal type fencing that

1 you'd see in your backyard. And that's pretty
2 much a description of the facility itself.

3

4 **Presiding Officer:** Let me verify that the translations
5 being broadcasted and is able to be understood.

6

7 [The defense translator and the accused conferred.]

8

9 **Translator:** Excuse me, Your Honor. The interpreter
10 requests that everybody speaks up and closer to
11 the microphone, please.

12

13 **Presiding Officer:** Yes, thank you. Captain Faulkner can
14 you----

15

16 **DC:** Yes, sir. It's my understanding that the last
17 couple of sentences didn't come through.

18

19 And I believe the last couple of sentences you
20 were talking about was----

21

22 **WIT:** The recreation area?

23

1 **DC:** Yes.

2

3 **WIT:** The recreation area is--we have two areas. They
4 are open--an open area that are enclosed with
5 metal fencing. The top is enclosed with a metal
6 fencing. It is a wire, mesh type fence.

7

8 **DC:** Yes, sir.

9

10 **WIT:** Detainees there are placed in there and in some
11 places up to two at a time can go in a recreation
12 pen, but in large part it is one at a time in
13 each pen.

14

15 **DC:** Sir, you mentioned a view port. How large is
16 this view port?

17

18 **WIT:** The view port, I would say, 12 inches [holding
19 his hands approximately 12 inches apart] by 12
20 inches thereabouts.

21

22 **DC:** Let the record reflect that the witness held his
23 hands approximately 12 inches apart.

1

2 **Presiding Officer:** You may.

3

4 **DC:** If a--if a--can a person in this cell see other
5 people in other cells?

6

7 **WIT:** No. He cannot. There--the methodology by which
8 detainees communicate on each tier is we open the
9 salad port--excuse me, the bean hole and the bean
10 hole you can look down and you might be able to
11 see another detainee's hand, but to make eye
12 contact would be very difficult.

13

14 **DC:** And how often are the bean holes open?

15

16 **WIT:** The bean holes are open during prayer--prayer
17 call. They are open to conduct another
18 transaction, i.e. to serve the food or----

19

20 **DC:** And you said the capacity is approximately 100?

21

22 **WIT:** 100.

23

1 **DC:** How many detainees are being held at Camp 5 now?

2

3 **WIT:** It's in the proximity of 75.

4

5 **DC:** How long has Camp 5 been in existence?

6

7 **WIT:** Camp 5 opened in May of 2004.

8

9 **DC:** What type of recreational time are the detainees
10 in Camp 5 afforded?

11

12 **WIT:** All detainees in Camp 5 are offered 2 hours of
13 recreation a day unless they're in a discipline
14 status. If they're in a discipline status--if
15 they're in a discipline status, it gets somewhat
16 complex for instance it ranges from 30 minutes up
17 to 2 hours.

18

19 **DC:** How much rec time do the Pre-Commission detainees
20 receive?

21

22 **WIT:** 2 hours.

23

1 **DC:** Do you know what time that happens?

2

3 **WIT:** It varies throughout the day. It will be offered
4 each day we rotate through the different tiers
5 and the blocks, so one day it may be the 5 to 7
6 the next day your tier may rotate to be the 7 to
7 9, the next day 9 to 11 and it just continuously
8 evolves.

9

10 One of the things we try to avoid is offering the
11 same tier because of the 2-hour recreation
12 requirement that I place, we have to, in essence,
13 really push that and manage the time, so what I
14 avoid is anybody always constantly being offered
15 a nighttime recreation though many of the
16 detainees much prefer the evening hours in the
17 nighttime. So if you got offered a nighttime rec
18 on one day, the next day you would be next in the
19 cue to get a daytime rec.

20

21 **DC:** Other than the Pre-Commission detainees, who is
22 housed at Camp 5?

23

1 **WIT:** Camp 5 is a--it houses a general population. We
2 have high value detainees there those being high
3 value detainees due to their intelligence value.
4
5 **DC:** Is there some sort of, I've read news articles
6 that talk about various levels. Are the
7 detainees classified on----
8
9 **WIT:** Yes.
10
11 **DC:** ----various levels? What are those levels?
12
13 **WIT:** We have four levels. We have highly compliant,
14 compliant, discipline, and segregation levels.
15 Within--if--I can--could go further. Within Camp
16 5, I house three of those levels.
17
18 **DC:** What three are those?
19
20 **WIT:** We have the highly compliant, compliant, and
21 discipline.
22
23 **DC:** And the other category is segregation?

1

2 **WIT:** Segregation, that's correct.

3

4 **DC:** Where are those detainees housed?

5

6 **WIT:** Segregation detainees are housed in Camp 3 in

7 Oscar Block.

8

9 **DC:** Of the 75 detainees at Camp 5, how many would you

10 say are highly compliant?

11

12 **WIT:** It is less than 5.

13

14 **DC:** And the Pre-Commission detainees that were moved

15 over there, three of the Pre-Commission detainees

16 that were moved there were moved to Camp 5 from

17 Camp 4?

18

19 **WIT:** That's correct.

20

21 **DC:** And----

22

23 **WIT:** I did not count those in that number.

1

2 **DC:** Okay. That was my question.

3

4 **WIT:** So--but I would continue to say that those
5 individuals were highly compliant so that would
6 take it more up to the range of eight to ten.

7

8 **DC:** What are the conditions of Camp 4?

9

10 **WIT:** Camp 4 is a communal camp. It has five bays we
11 call them. They are very--to describe it
12 generally it's a--they are metal structures that
13 house up to 40 individuals per. They are
14 separated into bays. There are four bays and
15 each bay houses ten individuals--up to ten
16 individuals. There's a central latrine facility
17 and shower facility in the center of each block.
18
19 Individuals in that camp are offered a much
20 greater freedom of movement. Inside of each bay
21 area is enclosed in a fence and we allow up to 20
22 individuals out at a time within each bay area,

1 and then there is a large rec yard in the center
2 of the compound, which we also will allow up to
3 20 individuals out. Inside of that area there is
4 a soccer field, a small soccer field
5 approximately, I'd say, 30 by 20; a volleyball
6 court; and a basketball court. And then there is
7 room around those three facilities for which
8 detainees can run.

9
10 **DC:** How many hours a day of rec time do the detainees
11 in Camp 4 receive?

12
13 **WIT:** They can range from as minimal would be 10 hours
14 where they're allowed out of their block up to 12
15 and sometimes more than 14 hours a day, but in
16 the large rec area, that is 2 hours a day.

17
18 **DC:** And at Camp 4, I assume, the--there's no effort
19 made to stop communication----

20
21 **WIT:** No.

22
23 **DC:** ----between or among anybody?

1

2 **WIT:** No. It would be impossible to do that.

3

4 **DC:** How does a detainee get to Camp 4?

5

6 **WIT:** A detainee goes to Camp 4 is a highly screened
7 process to where, perhaps I'll just start from
8 the beginning and tell you how we do it.

9

10 When my population at Camp 4 begins to drop below
11 the approximate number of--approximate number of
12 175, I start looking to do what we call the
13 vetting process. I then task my staff to come to
14 me with the top list of detainees who have had
15 the longest periods of time of compliant
16 behavior. Currently those that are being
17 considered as possible candidates for Camp 4 have
18 a minimum of 6 months of good behavior, i.e.
19 compliant behavior with guard force instructions,
20 have not carried out any types of assaults
21 against a guard.

22

1 We then establish that list. In essence, it's a
2 order of merit list with the longest compliant
3 behavior being at the very top. There's then a
4 forum where we meet with the Interrogation
5 Control Element at which time certain individuals
6 may be deemed highly uncooperative and they may
7 be vetoed, in essence, by the Interrogation
8 Control Element.

9
10 After we've gone through that process, that is
11 taken to the Commander of Joint Task Force and he
12 then approves recommendations of myself and the
13 Commander of the Joint Intelligence Group.

14
15 **DC:** Would you characterize all of the detainees as
16 Camp 4 as highly compliant?

17
18 **WIT:** Absolutely.

19
20 **DC:** And how many are in Camp 4 right now?

21
22 **WIT:** The approximate number is 175.

1 **DC:** So it--the way you described the process, it's
2 possible that a highly compliant detainee may
3 wait on some sort of list, a waiting list if you
4 will, before ever being even allowed to go into
5 Camp 4?
6

7 **WIT:** Well, that would not be a--close to an accurate
8 characterization. Once the list is approved, we
9 only vet that number which I have the capability
10 to house at that time and I immediately exhaust
11 that list and then it's just held in abeyance
12 until I have a, if you will, room in that camp.
13 I think it would be of interest to note that many
14 detainees decline to go there, so if I vet 13 in,
15 often times when we go to an inmate 99 percent of
16 the time they're coming out of Camp 1, anywhere
17 from 40 to 50 percent will decline going over to
18 Camp 4--30 to 50 percent will decline.
19

20 **DC:** Why is that 99 percent come from Camp 1?
21

22 **WIT:** Camp 1 is a compliant camp and that sort of like
23 the next step up to Camp 4 which is--really Camp

1 4 is the place where you get the status of highly
2 compliant.

3

4 **DC:** Okay.

5

6 **WIT:** That--it's almost one in the same.

7

8 **DC:** Okay so then a follow-up to that would be then
9 how did five highly compliant end up at Camp 5?

10

11 **WIT:** They were individuals who were giving special
12 consideration to what we call the 508 process in
13 that they were very compliant with us, very
14 cooperative with their interrogators, and they're
15 very compliant and very cooperative and so they
16 were given special amenities. In some occasions,
17 they were given special housing, but due to
18 security concerns and other concerns they have
19 had to been moved to Camp 5 where I could provide
20 greater security for them.

21

22 **DC:** What type of security concerns?

23

1 **WIT:** That which another detainee would carry out an
2 assault upon them for information that they had
3 provided.

4
5 **DC:** So actually of those--of the five highly
6 compliant that are at Camp 5 non Pre-Commission
7 detainees there are specific threats, perhaps--or
8 specific threats against them that you feel that
9 they need the extra protection----

10

11 **WIT:** Yes.

12

13 **DC:** ----of Camp 5?

14

15 **WIT:** Yes. That's correct.

16

17 **DC:** What--what is Camp 6?

18

19 **WIT:** Camp 6 is a new facility under construction.
20 It's anticipated to open in the August time
21 frame. It is modeled after a county prison in
22 Michigan. It will house up to 225 detainees. It
23 is constructed in the fashion that, very simply

1 put, allows me to carry out the security posture
2 that we have in Camp 1 and Camp 5 with
3 individuals cells, but at the same time, there is
4 a pod outside of each cell where I can allow up
5 to 20 individuals much like the Camp 4 fashion.
6 So it's a combination of providing me a security
7 and allowing greater freedom of movement for the
8 detainees.

9
10 **DC:** Would you characterize Camp 6 as more like Camp 5
11 or more like Camp 4?

12
13 **WIT:** Well, it's more like Camp 5 in that it's a modern
14 facility. It's more like Camp 6 in that
15 detainees will have significant amount of time
16 outside of their cells. I mean they will have
17 really it would be up to the commander at the
18 time and that commander being myself how long
19 they would be locked down for sleep period which
20 generally would go from 2200 hours until first
21 call to prayer. So other than that time frame,
22 as long as the detainee will be--are compliant,
23 it is my current intention that they will be

1 allowed out immediately into the pod outside of
2 their cell where they'll be able to speak freely
3 with and interact freely with other detainees.

4
5 Additionally, there's another rec yard that is
6 right off the side of each pod and so they will
7 be allowed greater recreation there and in
8 addition, there is a large soccer field being
9 created where I intend to allow up to 2 hours of
10 soccer there. So they'll have the recreation
11 time of not being locked down, if you will, will
12 be very equivalent to that in Camp 4.

13
14 **DC:** Would you agree that the location where a
15 detainee is held is, other than the Pre-
16 Commission detainees, is based solely on their
17 behavior?

18
19 **WIT:** No. There's some individuals that are held in
20 certain places for intelligence value.

21
22 **DC:** But not on--not on what they're giving
23 interrogators? Are certain people housed places

1 just because of what they're providing
2 interrogators?

3

4 **WIT:** Yes.

5

6 **DC:** Can a person make it to Camp 4 just because they-
7 ---

8

9 **Presiding Officer:** Excuse me. Let me interrupt you at
10 this point. We'll have a brief recess so
11 everyone can refresh themselves. We've been at
12 this for nearly an hour, so with that, the
13 Commission will be in recess. Thank you.

14

15 *The Commission Hearing recessed at 0951, 26 April 2006.*

16

17 *The Commission Hearing was called to order at 1017, 26*
18 *April 2006.*

19

20 **Presiding Officer:** This Commission will come to order.

21

22 **APROS:** All parties present when the Commission recessed
23 are again present.

1

2 **Presiding Officer:** Thank you. Captain, you may proceed.

3

4 **DC:** Thank you, sir. Sir, I noticed during the break
5 that several people came up and talked to you.
6 Were your discussions with any of those people in
7 regards to your testimony here today?

8

9 **WIT:** I was asked by one gentleman if I objected to the
10 use of my name. Beyond that, no.

11

12 **DC:** Okay. Sir, if we could go back to the rec time
13 at Camp 5 briefly. You said that detainees
14 received between 30 minutes and 2 hours?

15

16 **WIT:** That is correct.

17

18 **DC:** How is that decided? Who gets 30 minutes? Who
19 gets 2 hours?

20

21 **WIT:** That is decided by me and a senior chief that
22 works for me in the Detainee Operations Center.
23 We have a general matrix developed; in essence,

1 it is the amount of time that you have in
2 discipline.

3
4 Initially the first 48 hours, you will not go to
5 rec, and then you get 30 days. It is a graduated
6 scale over the period of time you are in
7 discipline to where within the last week you are
8 serving in discipline, say discipline would be a
9 30-day stint, that last week you would be up to 2
10 hours.

11
12 This is a relatively new thing we have just put
13 in. It has just started within the last 2 weeks.
14 Prior to that, discipline status detainees were
15 only allowed 20 minutes of recreation three times
16 a week.

17
18 **DC:** And sir, if you could put some pauses in your
19 answers.

20
21 **WIT:** Yeah, I am sorry.

22
23 **DC:** It is okay.

1

2 **WIT:** I will do better.

3

4 **DC:** So even discipline detainees can get 2 hours of
5 recreation a day?

6

7 **WIT:** Yes, that is correct.

8

9 **DC:** But if everybody at Camp were getting 2 hours of
10 recreation a day, it would be impossible. It is
11 impossible to give every detainee at Camp 5 2
12 hours of recreation a day.

13

14 **WIT:** No, we can do it, but I would note, significant
15 note, most detainees--well I shouldn't say that.
16 We average about 35 detainees a day in Camp 5
17 that refuse recreation. They will run from a low
18 of, I would say in the last 8 months, the lowest
19 I have ever seen is 29 refusals, 28 refusals, in
20 a day. It is often time a form of protest to
21 refuse rec.

22

1 **DC:** Okay, sir. If we could move on to how the pre-
2 commission detainees got to Camp 5. Who
3 ultimately approved the plan to move all of the
4 pre-commission detainees to Camp 5?

5
6 **WIT:** The general concept was approved by the
7 Commanding General at the time, who was Major
8 General Hood.

9
10 **DC:** When you say, "the general concept" what do you
11 mean by that?

12
13 **WIT:** In the January to February timeframe, I had to go
14 through various courses of action to present to
15 him on how I would reconfigure the camps, and I
16 presented to him concepts of where I would, in
17 essence, it boiled down to in this very
18 particular instance that I would take all
19 Commissions candidates and place them in Camp 5
20 and so he approved that as a particular.

21
22 **DC:** And was this plan staffed through various
23 agencies in the JTF?

1

2 **WIT:** Absolutely.

3

4 **DC:** Who all did it go through?

5

6 **WIT:** It would be easier to say who it did not go to
7 and it is no one. As the whole process unfolded,
8 to give you a better understanding, perhaps
9 understanding of how it transpired; weekly I meet
10 with the Commander of the Joint Task Force and
11 during that period of time during that weekly
12 meeting, I present any issues to him that he has
13 to make a decision on. In attendance at that
14 meeting is representatives of his full staff of
15 every subordinate Command element.

16

17 So my staff does the prior coordination full wide
18 within the Joint Task Force and then the actual
19 decision briefing, that he is taking there are
20 full representatives of all organizations within
21 the Joint Task Force.

22

1 So the very simple answer is very broad, no one
2 excluded.
3
4 **DC:** Was anyone from outside the Joint Task Force
5 consulted?
6
7 **WIT:** Negative.
8
9 **DC:** Is there a written decision? Is there a written
10 version of this plan?
11
12 **WIT:** No, I had a VOCO that your plan is approved; move
13 forward.
14
15 **DC:** Is your plan written?
16
17 **WIT:** Of--no, because it is really--I can describe it
18 to you in three sentences.
19
20 **DC:** Okay, please do.
21
22 **WIT:** Close camps 2, 3, with the exception of
23 segregation and discipline blocks. Move all the

1 population into Camp 1 other than the segregation
2 and discipline. Move Commissions to Camp 5.
3 Maintain population of roughly 80 percent in Camp
4 5. Maintain approximate population of 175 in
5 Camp 4, and the remainder would be in Camp 1.

6

7 **DC:** And so this plan that was apparently approved by
8 everyone on the JTF Staff. There is no written
9 approvals, suggested changes, email traffic?

10

11 **WIT:** Well the plan, I don't think it is all verbal.
12 The plan was, as we do most decisions, in the
13 Joint Task Force, are PowerPoint slides presented
14 laying out the concept. There were--my staff may
15 well have had email exchanges. Myself, I
16 conferred with the J Director and the SJA
17 personally. Beyond that, that is the level of
18 coordination.

19

20 **DC:** Do these briefing slides on PowerPoint still
21 exist?

22

23 **WIT:** Yes, I am sure they do.

1

2 **DC:** Are they readily accessible to you, if you had
3 your computer?

4

5 **WIT:** I don't keep them on mine, but I am sure my S-3
6 has got them.

7

8 **DC:** But there is essentially no, other than just your
9 personal conferences with the SJA and who else
10 did you say?

11

12 **WIT:** The Director of the Joint Intelligence Group.

13

14 **DC:** The Director of the Joint Intelligence Group,
15 there is no written approvals, no written
16 concurrences, no written opinions of any sort?

17

18 **WIT:** No, I mean I would make it clear that movement
19 within the camps is something we do rather
20 routinely. I mean, it is not like a huge
21 overwhelming deal with us.

22

1 I mean, we have close to--I have had over 535
2 people where I have to move them when we do
3 within a month's period, I will do close to 500
4 moves a month. It is not like that grand of a
5 deal, and I hate to say it, to me, it is part of
6 my routine. I have to do it almost daily.

7
8 **DC:** But this was a decision, a briefing, that was
9 presented to the JTF Commander?

10
11 **WIT:** Yes.

12
13 **DC:** And----

14
15 **WIT:** As a concept. As a changing concept as to where
16 we would move and house people.

17
18 **DC:** But----

19
20 **WIT:** The main focus of the briefing was not about the
21 Commissions. That really was a very small piece
22 of it.

23

1 Really, that was a bottom-line level. The real
2 issue was me closing a camp. Which camp was I
3 going to close and how was I going to
4 accommodate? Where was I going to be to be able
5 to get the populations to fit so as to maximize
6 the guard force? That was the real issue.

7
8 The Commissions issue, that was a side issue, a
9 very, very small issue.

10
11 **DC:** So the consolidation of all the Commission
12 detainees into one location is not a big deal?

13
14 **WIT:** I didn't say it was a big deal. The----

15
16 **DC:** It is a small----

17
18 **WIT:** I said it was a small issue in the whole of which
19 I had to deal with.

20
21 **DC:** Okay, and one of the reasons you say that you
22 consolidated the Commission detainees was because

1 of a reduction in the number of camps and the
2 closing of various camps?
3
4 **WIT:** That is correct.
5
6 **DC:** Did all of the Commission detainees need to be
7 moved to Camp 5 in order to effectuate this
8 consolidation?
9
10 **WIT:** For me to effectively use all bed space in the
11 right camps, it was a piece of the puzzle.
12
13 **DC:** Several of the detainees were already in Camp 5,
14 the Commission detainees?
15
16 **WIT:** That is--just give me a second.
17
18 [Pause.]
19
20 **WIT:** I think the number is three. That is one of
21 those--I think the number was three.
22
23 **DC:** Three of them were already in Camp 5?

1

2 **WIT:** Yes.

3

4 **DC:** And three of them were in Camp 4?

5

6 **WIT:** Three in Camp 4.

7

8 **DC:** And the remainder, which would be four?

9

10 **WIT:** I had two in Camp 1, so that would be eight. I
11 had one in discipline, that is nine, and I am
12 missing somebody. I can't recall the other guy.
13 It may perhaps have been four in 5.

14

15 **DC:** Camp 4 is not scheduled to close?

16

17 **WIT:** No, Camp 4 will stay open.

18

19 **DC:** Would the presence of Mr. Barhoumi in Camp 4
20 somehow impact the use--the efficient use of the
21 guard force?

22

23 **WIT:** Yes.

1

2 **DC:** How so?

3

4 **WIT:** Because that is another space I can use in Camp 4
5 that I can put another compliant detainee in.

6

7 **DC:** Mr. Barhoumi was already in Camp 4.

8

9 **WIT:** But I can move him out.

10

11 **DC:** Under that logic, couldn't you also move the
12 person that you were going to put in over to Camp
13 5?

14

15 **WIT:** No, because he would be a highly compliant
16 detainee who would be entitled to the greater--
17 not entitled; who I would be giving the greater
18 privileges to.

19

20 **DC:** Mr. Barhoumi was highly compliant?

21

22 **WIT:** He was highly compliant but he was a Commissions
23 candidate and a point that I think has been

1 missed so far that I have not articulated yet is
2 that my move of putting those pre-commissions
3 candidate or commissions candidates are based off
4 of three documents.

5
6 **DC:** Well, sir, I don't want interrupt you and I am
7 going to get to your other issue and we will talk
8 about that, but from the perspective solely of a
9 use of manpower, it is just a numbers game,
10 right?

11
12 **WIT:** Yes.

13
14 **DC:** So whether it is Mr. Barhoumi in Camp 5 or Mr.
15 Jones in Camp 5 or Camp 4, it doesn't really
16 matter?

17
18 **WIT:** No, I wouldn't say that because I have to deal
19 with the detainees. For every detainee in Camp 1
20 that--half the population of Camp 1 wants in Camp
21 4 and they think they are entitled to it just as
22 much Mr. Barhoumi.

23

1 **DC:** And everybody in Camp 4 believes that they are,
2 as you say, entitled to stay in Camp 4 so long as
3 they are following the rules.

4

5 **WIT:** Everybody in Camp 5 thinks they are entitled to
6 be in Camp 4. Everybody in Camp Echo thinks they
7 are entitled to be in Camp 4. Everybody thinks
8 they are entitled to be in Camp 4.

9

10 **DC:** But a person that was moved out of Camp 4 over to
11 Camp 5 would understandably feel like he was
12 being punished in some way, wouldn't he?

13

14 **WIT:** No. I have people everyday that say, "I want out
15 of Camp 4."

16

17 **DC:** The people who are----

18

19 **WIT:** I just moved one yesterday or 2 days ago that
20 wanted out of Camp 4. He said, "I don't like it
21 here. I want out."

22

1 **DC:** The people who are not asking to be moved out
2 would feel like they are being punished.
3
4 **APROS:** Objection. That calls for speculation.
5
6 **Presiding Officer:** Well I will allow it.
7
8 **WIT:** I would say that it is very clear that you are
9 going to give up a greater amount of recreation.
10 So, if you ask me a question such as, "What is my
11 personal preference of where I would like live?"
12 I wouldn't live in 4.
13
14 **DC:** Okay. Sir, a few minutes ago you said that you
15 had to move Mr. Barhoumi from Camp 4 over to Camp
16 5 and in the context that we were discussing was
17 the consolidation and you said that that allowed
18 for you to move somebody else into Camp 4?
19
20 **WIT:** That is correct.
21

1 **DC:** It didn't have to be Mr. Barhoumi that moved out
2 of Camp 4, it could have been anybody out of Camp
3 4?

4
5 **WIT:** Well yeah, I could take Camp 4 and take all 175
6 of them out and move them somewhere else and then
7 I can move another 175 in, but I am afraid I am
8 just honestly and sincerely, I do not follow your
9 logic right now on your question.

10
11 **DC:** Why did it have to be Mr. Barhoumi that moved out
12 of Camp 4?

13
14 **WIT:** Because of the reason that you want me to answer
15 right now.

16
17 **DC:** Okay, lets talk about that. In your affidavit
18 you talk about a couple of Army regulations that
19 require that pretrial prisoners be separate from
20 post-trial prisoners.

21
22 **WIT:** That is correct. There are two Army regulations
23 and it is consistent with the III Geneva

1 Convention as well that I would house them
2 separately.

3
4 So the one Army regulation, Army Regulation 190-
5 8, concerning enemy prisoners of war and
6 detainees, other detainees, that Geneva
7 Convention, the III Geneva Convention serves as
8 the underpin for that.

9
10 So, in all three instances of what I look to for
11 basic guidance in how I run the camps, those are
12 my three major reference documents; the III
13 Geneva Convention; AR 190-47, the Army
14 Correctional System; and AR 190-8. All three of
15 those give me the same answer.

16

17 **DC:** Do you know where in 190-8 that is says to do
18 that?

19

20 **WIT:** If you have a copy of 190-8 in front of you, I
21 can find it. I can tell you that in 190-47 it is
22 Chapter 11. In the III Geneva Convention it is

1 Article 103, and in 190-8 it is toward the back
2 portion of the regulation.
3

4 **DC:** And what do those regulations, in general, say?

5
6 **WIT:** 190-47 tells me that a pretrial should be given
7 recreation separately from pretrial, that they
8 should not work with pretrial, and that they
9 should be billeted separately. That pretrial
10 should be billeted separately.
11

12 AR 190-8, consistent with the III Geneva
13 Convention, says that individuals who are going
14 before a trial for either hostilities or during
15 hostilities, if you will, war crimes, that they,
16 if they are--if they have committed an offense
17 that a member of those forces of the detaining
18 power's forces had committed, if the same offense
19 for the detaining power's forces was committed by
20 a member of their forces, if they would have
21 confinement, that they too should be placed in
22 confinement.
23

1 You have to understand the context of the III
2 Geneva Convention and AR 190-8, which they speak
3 of prisoner of war operations in that it is
4 closer to what the ICRC says and as they are the
5 recognized authority for the interpretation of
6 the III Geneva Convention, that Camp 4 is
7 equivalent to that envisioned by the III Geneva
8 Convention.

9
10 So when the III Geneva Convention and AR 190-8
11 speaks of confinement, they are speaking in terms
12 of closed-cell confinement, that which is akin to
13 Camp 5.

14
15 **DC:** Who at Guantanamo is not pretrial?

16
17 **WIT:** I would say there are quite a few people not
18 pretrial. I know of 10 people who are pretrial.
19 The rest are defined to by the Department of
20 Defense as enemy combatants. I know that there
21 are over 140 individuals that the Department of
22 Defense is considering for transfer.

1 **DC:** Have any of them been tried?

2

3 **WIT:** I don't know if you call this a trial or not? If
4 this process here--I would define as a trial and
5 that is what I use as definition, that this is a
6 trial. So the 10 current Commission candidates
7 are what I consider, in this context, to be a
8 trial.

9

10 **DC:** Has anybody at Guantanamo been convicted of any
11 crime?

12

13 **WIT:** Not yet.

14

15 **DC:** And----

16

17 **WIT:** And now I see the point that you are trying to
18 get at is that somebody who is pretrial is
19 different than post-trial. The intent of all the
20 Army regulations, both 47 and 190-8, and 190-8 in
21 particular and consistent with the III Geneva
22 Convention, is that you categorize people by
23 their different statuses.

1

2

Frankly, there is no current guidance that
envisions what we are in, so that is why I have
to use various different reference documents.

5

6 **DC:**

But the regulations which you have reference
specifically talk about pretrial versus post-
trial, correct?

9

10 **WIT:**

Not 190-8. If we take 190-8 in its purest sense,
just--if you take 190-8, just the mere fact that
he is going through a trials process means that I
can put him in confinement; means that I should
put him in confinement. If a member of the
detaining power's forces had committed a similar
type of offense.

17

18 **DC:**

It says that you should put them in confinement
but it doesn't say that you should put the people
that are facing trial together.

21

22 **WIT:**

It says to put them in confinement. Then AR 190-
47 says I should segregate those individuals from

23

1 everyone else. Then the effectiveness--I cannot
2 segregate anybody and have 10 separate
3 cellblocks. I do not have the guard force.

4

5 So, operational concerns are such that I have to
6 consolidate them because they are the only
7 population that can be allowed together.

8

9 **DC:** 190-47 simply says that pretrial should be
10 segregated from post-trial?

11

12 **WIT:** That is correct.

13

14 **DC:** And there are no post-trial prisoners here?

15

16 **WIT:** The spirit of 190-47, as I interpret it, is that
17 it means pretrial should be segregated from those
18 other populations 190-47 does not have another
19 category to which it would speak. That is where
20 I have to balance 190-8 against 190-47.

21

1 **DC:** You have mentioned it a couple times, the spirit,
2 but the words of 190-47 are pretrial and post-
3 trial.

4
5 **WIT:** That is correct.

6
7 **DC:** There is no generalization that pretrial should
8 separated from some others.

9
10 **WIT:** Perhaps I can help you. There is nothing
11 prescriptive telling me that I have to do this,
12 that, or the other thing. I have to choose and
13 this is my call. I have to look at pieces of
14 guidance from 190-47, 190-8, the III Geneva
15 Convention, and make the best decision I can
16 combining all those, because there is no singular
17 one document that covers the operations in
18 Guantanamo. It is something that I have to live
19 with everyday in all my operations. Everything I
20 do is in form with those documents.

21
22 **DC:** But the documents that are informing you are
23 telling you to separate pretrial and post-trial.

1

2 **WIT:** That is correct.

3

4 **DC:** And nobody here is post-trial.

5

6 **WIT:** But 190-8 would tell me that I should confine
7 him.

8

9 **DC:** And he is confined?

10

11 **WIT:** No, not in the context of 190-8. If you were
12 confined in Camp 4, Camp 4 would be akin to an
13 enemy prisoner of war camp, 190-8 version. So,
14 take what 190-8 tells you to do with enemy
15 prisoners of war and other detainees. In that
16 context, a detainee would be living in setting
17 like Camp 4. It then says that if an individual
18 is going before a trial, then he can be, should
19 be, confined in--if a member of the same forces--
20 if you take that caveat, then he should be
21 confined. Confinement in that context means
22 closed-cell confinement. That which, we actually
23 have in Camp 1 and that is one of our

1 inconsistencies that we currently or why
2 Guantanamo operations are not in full compliance
3 with the III Geneva Convention, because some
4 individuals are held in closed-cell confinement,
5 i.e. Camp 1 and Camp 5.

6

7 **DC:** Your assertion is that Camp 4 is not confinement?

8

9 **WIT:** Camp 4 is a medium security facility and it is,
10 in the context of 190-8, a prison camp equivalent
11 to an enemy prisoner of war camp.

12

13 **DC:** But it is not confinement?

14

15 **WIT:** In the context of 190-8, it is not confinement.
16 It is an enemy prisoner of war camp. It would be
17 more akin to that than confinement in the way
18 that 190-8 is written.

19

20 **DC:** Where are the pre-commission detainees held at
21 Camp 5?

22

1 **WIT:** They are held in Charlie, lower. That is the
2 first floor of Charlie wing.
3
4 **DC:** All of them?
5
6 **WIT:** All of them.
7
8 **DC:** All 10 are in one wing.
9
10 **WIT:** All 10 are not there presently.
11
12 **DC:** How many are not there?
13
14 **WIT:** Two are not there presently.
15
16 **DC:** Why not?
17
18 **WIT:** One is there due to a court order from a Federal
19 District Court of last summer, that his case is
20 pending going before the Supreme Court, so he is
21 not there.
22

1 And there is one other individual who is Camp 1,
2 who frankly for operational reasons, I am deemed
3 necessary to hold him there for a period of time,
4 but he will move to Camp 5 and he knows he will
5 move to Camp 5.

6

7 **DC:** When will he move to Camp 5?

8

9 **WIT:** When operational reasons allow me to move him
10 over there.

11

12 **DC:** Why are all the pre-commission detainees in the
13 same wing or tier?

14

15 **WIT:** If I put them on other tiers they would be mixed
16 in and would be inconsistent with the guidance of
17 190-47. So if I move them to Charlie upper or
18 Alpha lower they would then be billeted in the
19 same area as those other individuals.

20

21 **DC:** But that is okay for the one guy with a federal
22 court order?

23

1 **WIT:** The federal court order I am afraid trumps what I
2 do and how I do business.

3

4 **DC:** So they don't have to be together?

5

6 **WIT:** The have to be is my interpretation of the
7 guidance from two Army regulations and the III
8 Geneva convention. That is all the have to be
9 that there is, and concern for the security and
10 safety of the detainees, which is really the
11 underpin of all of what I am talking about.

12

13 **DC:** What happens if more detainees are charged?

14

15 **WIT:** Then I have to consolidate and move people. I
16 would create another tier. If we have five more,
17 I will empty a tier, consolidate, and I will
18 create another tier.

19

20 **DC:** What if there is 100 more?

21

22 **WIT:** I would consolidate, more, and empty a whole
23 facility.

1

2 **DC:** 200?

3

4 **APROS:** Objection, speculation.

5

6 **WIT:** I would move----

7

8 **Presiding Officer:** Excuse me, Colonel, there is an
9 objection pending.

10

11 **APROS:** This is all speculative at this point. It is not
12 relevant for the disposition of this motion,
13 whether or not we try 100, 200, 300 people and
14 what he would do in the event we ever do that.
15 It is just not necessary.

16

17 **Presiding Officer:** Captain?

18

19 **DC:** Sir, it goes to test the basis of his--of the--of
20 his--the very foundation of why he is moving all
21 of the pre-commission detainees into separate
22 wings and if he would continue to do so if there
23 were 100, 200, or 490 Commissions proceedings.

1

2 **Presiding Officer:** All right, I find that it is
3 instructive for the thought process. The
4 objection is overruled. You may continue.

5

6 **DC:** If there were 200, you would consolidate all 200
7 at one location?

8

9 **WIT:** I can immediately answer with 100, I would; 200 I
10 would have to begin to give a thought as to how I
11 would do it, but that would be my objective.

12

13 **DC:** At some point, it is possible that there would be
14 so many Commissions that Commissions detainees
15 would be held in Camp 4?

16

17 **WIT:** No.

18

19 **DC:** That is not possible?

20

21 **WIT:** I would not see that happening because there
22 would be--I would then put them in confinement in
23 a max security facility. I have multiple max

1 security facilities. I have Camp 1 where I can
2 house well over 200 individuals. I have Camp 2,
3 3, where I can house well over 200 people.

4
5 So I have maximum-security facilities. If the
6 individual that I talked about that is not in
7 Camp 5, he is in a maximum-security facility.

8
9 One of the problems of Camp 4 that I have not
10 made clear is that it is a medium-security
11 facility and for someone to be charged in a
12 Commissions trial and this process, to be in a
13 medium-security facility means I have not imposed
14 a level of security appropriate to the potential
15 risk that could be there.

16
17 **DC:** What is the risk?

18
19 **WIT:** The risks are several. There is risk of escape.
20 There is risk of harm to the detainee either be
21 other detainees or risk of harm that he would
22 impose upon himself.

1 **DC:** Why did it take so long to consolidate the pre-
2 commission detainees?
3
4 **WIT:** When you--and I don't mean to sound
5 argumentative, but when you say, "why did it take
6 so long?" I don't--I would not say that it did.
7
8 **DC:** If the consolidation was a result of abidance by
9 regulations and Geneva Conventions--I mean, are
10 you aware that Mr. Barhoumi was designated for
11 Commissions in July of 2004.
12
13 **WIT:** Frankly, I am not aware of that.
14
15 **DC:** That he was charged in November of 2005.
16
17 **WIT:** That I am aware of.
18
19 **DC:** So from November of 2005 until March 30th, on or
20 about, 2006, he was in Camp 4, right?
21
22 **WIT:** That is correct?
23

1 **DC:** Did he ever try to escape?

2

3 **WIT:** Not to my knowledge.

4

5 **DC:** Was there ever any threats or was he ever the
6 target of any attacks?

7

8 **WIT:** No, but if I may answer this in context of the
9 way I viewed it; is that the Commission's process
10 was not, at that time, full blown, so we were not
11 putting ourselves in that position of which the
12 things that can transpire, the real reason why we
13 have AR 190-47, those things were not impending,
14 but again, there is no singular one little silver
15 bullet in any answer I give because everything is
16 taken as a whole.

17

18 In that, operational concerns of closing camps
19 was upon me, so that was a very large part of
20 driving this whole process. Over time, there was
21 no doubt in my mind that we were going to
22 consolidate them, it was just the next thing I
23 had to get to.

1

2 **DC:** I believe there were hearings scheduled as far
3 back as August of 2004 or '5 in one of the
4 detainee's cases. That didn't strike a chord
5 that there might be some pending trials?

6

7 **WIT:** We had the individuals that I knew that were in
8 the cue that were line up were housed in
9 segregated block in a maximum security facility
10 where they were not with the population.

11

12 **DC:** Is that the T Block at----

13

14 **WIT:** That is correct.

15

16 **DC:** And what are the conditions like there?

17

18 **WIT:** That is the--the difference is that is a very
19 long tier--it is slightly different it is just
20 because it has a smaller number of cells but the
21 difference in that and in Camp 5 setting is that
22 in Camp 5 it is a totally enclosed cell with a
23 wall, a solid wall. In Camp 2, and 3, and 1, it

1 is a mesh screen so you can see the detainee next
2 to you to, to your left or to your right, or
3 across the tier, but it is an enclosed closed
4 confinement cell.

5

6 **DC:** And that is at Camp 1?

7

8 **WIT:** That is camps 1, 2, and 3.

9

10 **DC:** This Tango block?

11

12 **WIT:** Tango is in Camp 3.

13

14 **DC:** Okay, do you know how long Mr. Barhoumi has been
15 at Camp 4?

16

17 **WIT:** I really can't answer that. He has been at it
18 for quite a period of time but I don't have the
19 dates. I can get those with a phone call. I can
20 get those if you need.

21

22 **DC:** Would it sound approximately correct to you that
23 he has been there since the spring of 2005?

1

2 **WIT:** I couldn't really say. I wouldn't surprise me.

3

4 **DC:** In the time that he was in Camp 4, are you aware
5 of any threats or him being the target of any
6 attacks?

7

8 **WIT:** No, I am not.

9

10 **DC:** Are you aware of him making threats against any
11 other people in Camp 4?

12

13 **WIT:** I am not.

14

15 **DC:** Of the three detainees that were moved from Camp
16 4 to Camp 5, one of those detainees was the
17 target of threats made by another detainee?

18

19 **WIT:** He was in a position such that had information he
20 provided been known to the wider population, he
21 clearly in my mind would have been in a position
22 of threat against him.

23

1 **DC:** Weren't there specific threats made against him
2 or that you were made aware of by another
3 detainee?

4
5 **WIT:** Specific, meaning I will retaliate against him?

6
7 **DC:** Yes, sir.

8
9 **WIT:** No, it was more of the information that--if that
10 information gets to that guy and that guy will,
11 because it was very incriminating against another
12 individual, that he would carry out something
13 against him because of its incrimination and
14 because they both were going to be sitting in
15 these proceedings. And again, that is another
16 reason why we have these----

17
18 **Presiding Officer:** Excuse me. Let me interrupt for just a
19 moment. You said since the Spring of 2005, you
20 wouldn't disagree that Mr. Barhoumi was in Camp
21 4, is that right?

22

1 **WIT:** Yes, sir. That would not surprise me that he was
2 there. I can find the exact dates of when he
3 arrived but----

4
5 **Presiding Officer:** No, what I didn't understand is that at
6 the same time you are talking about other
7 detainees who were pending Commissions and there
8 was a situation that you considered with respect
9 to one that may have been threatening?

10
11 **WIT:** Yes, sir.

12
13 **Presiding Officer:** Okay, thank you. Please proceed.

14
15 **DC:** Are you aware of any behavioral problems with Mr.
16 Barhoumi?

17
18 **WIT:** No, I am not.

19
20 **DC:** So the only reason that Mr. Barhoumi was moved
21 from Camp 4 to Camp 5 was that he was pre-
22 commission?

23

1 **WIT:** That is correct.

2

3 **DC:** Are either Camps 4 or 5 set to close?

4

5 **WIT:** No.

6

7 **DC:** And have Camps 2 and 3 closed?

8

9 **WIT:** With the exception of the segregation and the

10 discipline blocks, they have closed. They did

11 house other populations.

12

13 **Presiding Officer:** I am sorry, which ones?

14

15 **WIT:** Camps 2 and 3, sir.

16

17 **Presiding Officer:** Thank you.

18

19 **DC:** What is the capacity of all the camps?

20

21 **WIT:** Over 1,300.

22

1 **DC:** And when you say that Camps 2 and 3 are going to
2 close, exactly what does that mean?

3

4 **WIT:** It means that we would no longer use those
5 facilities, those blocks within that camp.

6

7 **DC:** Would they be torn down?

8

9 **WIT:** No, they would be, in essence, a mothball status.

10

11 **DC:** I would like to go back, just for a minute, to
12 exactly--you said that Mr. Barhoumi was only
13 moved because he was pre-commission.

14

15 **WIT:** That is correct. May I?

16

17 **DC:** Sure.

18

19 **WIT:** Pre-commissions, again, the real baseline for my
20 whole motivations in everything is running a
21 peaceful, safe, and secure camp. And that--in
22 doing that means that I have to take care of him
23 and I have to ensure his safety. I take that

1 task very seriously. And I feel strongly that I
2 have him in the best possible location to ensure
3 his safety during this process.
4

5 **DC:** But you are not aware of any threats to his
6 safety.
7

8 **WIT:** There is a general threat, in my dealings of law
9 enforcement and corrections, which I do not have
10 that great of a correctional background, but I
11 can tell you that during the trial process, it is
12 very commonly known among those in the law
13 enforcement corrections field, that is the
14 greatest time at which an individual would
15 undergo threat. And so, and that is a general
16 knowledge----
17

18 **DC:** A threat from someone else?
19

20 **WIT:** A threat from someone else or a threat to
21 himself, because during the trial process
22 individuals can become despondent. Things can

1 happen and so they sometimes will turn to self-
2 injurious behavior.

3

4 **DC:** But have you ever observed Mr. Barhoumi engage in
5 self-injurious behavior?

6

7 **WIT:** I have not, but in this circumstance and in all
8 correctional environments, you have to know of
9 what exists out there and you have to know that
10 your greatest priority is ensuring safety and
11 security.

12

13 My next concern down the line, much further down
14 the line, is improving detainee's quality of
15 life, which I have put a significant amount of
16 energy into.

17

18 But someone's quality of life compared to their
19 safety and security is a lot a different on the
20 Maslow's theory of hierarchy and needs the last
21 time I looked at it.

22

1 **DC:** But you would agree that Mr. Barhoumi, as a
2 result of moving from 4 to 5 suffered a decrease
3 in quality of life?
4

5 **WIT:** I would say that if you think that having more
6 recreation time is more important than being safe
7 and secure then that would be a judgment that you
8 would make. I would not make that judgment.
9

10 **DC:** If a person pending trial is in such danger of
11 either injury to himself or injury from others,
12 why wasn't Mr. Barhoumi moved to Camp 5 when he
13 was designated in 2004, when he was charged in
14 November of 2005, when he received a lawyer on 5
15 December of '05, when his charges were referred
16 on 16 December of '05, when----

17
18 **APROS:** Objection, this is a compound question.
19

20 **DC:** Why wasn't he moved----
21

22 **Presiding Officer:** Sustained.
23

1 **DC:** Why wasn't he moved when charges were--when he
2 was designated in 2004?
3

4 **WIT:** I suppose the best answer I could give, is that
5 perhaps you could lay that at my incompetence.
6

7 **DC:** I mean, Camp 5 was there in 2004, correct, sir?
8

9 **WIT:** That is correct.
10

11 **DC:** So he could have been moved?
12

13 **WIT:** He could have. If, again, to my knowledge I did
14 not become aware that he was a candidate and I am
15 just trying to put together in my head a timeline
16 here, I dealt with the bulk of my time here, I
17 have dealt with the three, and not until the very
18 latter portion of last year did I become aware
19 that others were being charged.
20

21 **DC:** But there----
22

1 **WIT:** And again, there is only one real reason why they
2 weren't and it is to my failure to move out and
3 move on the issue. It is my failure that I
4 didn't do it.

5

6 **DC:** And during that time period that you failed to
7 move them, there was no harm done to them, was
8 there?

9

10 **WIT:** He is sitting here safe and sound.

11

12 **DC:** He didn't try to escape during that time frame?

13

14 **WIT:** [The witness shook his head in the negative.]

15

16 **DC:** He didn't try to kill himself during that time
17 frame?

18

19 **WIT:** [The witness shook his head in the negative.]
20 But I--I would only offer, if I can enter the
21 dialog, is that the trial process for him was not
22 really beginning. Now, I will just--really the
23 real answer is that it was my failure. He should

1 have been moved immediately. I failed. I did
2 not execute my responsibilities properly. It
3 should have been done immediately, and there's
4 only one person to blame and it's me.

5

6 **DC:** Thanks, sir. I don't have any further question.

7

8 **Presiding Officer:** Cross-examination?

9

10 **APROS:** Yes, sir. Thank you.

11

12 Good morning, Colonel. Colonel, did you move the
13 accused to retaliate against him for his
14 cooperation with the Commission process?

15

16 **WIT:** Absolutely not.

17

18 **APROS:** And Captain Faulkner asked you about this plan
19 that you had formulated to move all of the
20 Commission detainees to one block. Was, in fact,
21 the accused moved pursuant to that plan?

22

23 **WIT:** Yes.

1

2 **APROS:** If a detainee has an issue regarding his
3 confinement, how does he get it addressed?

4

5 **WIT:** Detainees interact with the guard force routinely
6 and almost daily I deal with issues of status of
7 detention where they're at. That bubbles up from
8 the Sergeant of the Guard to the camp commander
9 to the--one of the two battalion commanders and
10 then to myself. So the process--it's just like
11 following the military chain of command. They
12 inform them and that will bubble up to me. Many
13 times, they are handled at lower--lower tiers,
14 you know, this individual this cell is inop, my
15 toilet's not flushing or this that or the other
16 issue and the black sergeant will call to the
17 detainee operation center and say, "we need to
18 move him" and they will be moved.

19

20 **APROS:** So the Sergeant of the Guard has authority to act
21 on his own if necessary to----

22

1 **WIT:** He must coordinate any movement with the
2 Detention Operation Center. Beyond that, he can
3 move internally with his area of responsibility.
4 Did--did that make sense? I'm not----
5
6 **APROS:** Yes, sir.
7
8 **WIT:** If a block sergeant is running--if he's
9 responsible for Charlie lower and a cell becomes
10 inop, if there's a justifiable reason as to why a
11 detainee should be moved, then he has to just
12 coordinate through the chain of command to the
13 Detention Operation Center and say we need to
14 move so and so and it's done.
15
16 **APROS:** Now, the accused is handicapped. He has an issue
17 with his hand having been amputated. Do you have
18 any other handicapped people in your camp?
19
20 **WIT:** Yes. Yes, we do.
21
22 **APROS:** Do you have any other amputees in your camp?
23

1 **WIT:** Yes, we do.

2

3 **APROS:** Do you know the number?

4

5 **WIT:** It's in the proximity of 22 to 23 individuals.

6

7 **APROS:** If they ever have a problem with any of the
8 conditions of their confinement due to their
9 handicap are--have you helped them in the past?

10

11 **WIT:** We have, absolutely We make modifications. We
12 provide those from the medical department itself.
13 We provide the apparatus necessary to help them
14 in their daily life so accommodations are made
15 fully for any disability.

16

17 **APROS:** Now, the defense has raised the fact that the
18 accused is unable to wash himself in his current
19 cell. Would you agree with that statement?

20

21 **WIT:** He raised that with me in a meeting that we had
22 approximately one month ago.

23

1 **APROS:** The accused did or the defense?

2

3 **WIT:** The defense attorney.

4

5 **APROS:** Okay. And was anything done to remedy that
6 issue?

7

8 **WIT:** The very next morning, I had my engineer and the
9 camp commander move into his cell and we modified
10 the sink such that if you--we made it like the
11 push button you will get a longer running of
12 water.

13

14 **APROS:** Okay. And how long did it take for you to
15 respond to that request?

16

17 **WIT:** Within hours. Very--we concluded our meeting
18 probably 1900 or so. It was my first order of
19 business the very next morning.

20

21 **APROS:** And to your knowledge, has the accused ever asked
22 any of your personnel, prior to hearing it from
23 the defense?

1

2 **WIT:** No. When I--when I spoke to the guard force
3 about it, they were a bit shocked. We were going
4 through the--the modifications in his cell and
5 they said that he was very adept at manipulating
6 the push button sink and able to cleanse himself
7 very adeptly and they said he has never
8 complained about it. They had no complaints
9 whatsoever of him about his cell from figuration.

10

11 **APROS:** Now, you also spoke of one individual that has
12 not yet been moved to Camp 5 and I believe at the
13 time the defense wrote their motion there were
14 actually two people that still had not been
15 moved?

16

17 **WIT:** That's correct.

18

19 **APROS:** Okay. But one of those has been moved to Camp 5?

20

21 **WIT:** Yes, sir.

22

1 **APROS:** Okay. Before you moved them, was it your
2 intention to reward those people for not
3 cooperating with the Commission's process?
4

5 **WIT:** Could you say again? I must have missed it.
6

7 **APROS:** Yes, sir. Those two people that hadn't moved to
8 Camp 5, was that done to reward them for not
9 cooperating with the Commission process?
10

11 **WIT:** Oh, no. Absolutely not. In one instance, the
12 individual had to serve additional time in a
13 maximum security cell--additional--he was in
14 Romero Block. In the other instance, he was in a
15 maximum security cell in Camp 1 and for matters--
16 for matters he has not been moved other matters
17 that, frankly, verge on classified.
18

19 **APROS:** Yes, sir. Getting back to the arrangement right
20 now that the accused has in his cell, regarding
21 the sink. Now, is the sink arrangement in Camp 5
22 any different than it was in Camp 4?
23

1 **WIT:** They are different, but they are push button
2 sinks. In essence, they are the same type sink.

3

4 **APROS:** And when you say, "push button" can you describe
5 to the Presiding Officer what you mean by push
6 button?

7

8 **WIT:** Rather than a handle that you would turn to turn
9 it on it is consistent with most throughout
10 correctional system is a button that you push
11 like at a rest stop along the highway so the
12 water doesn't run forever kind of deal. Push it
13 once for so many seconds and then it stops.

14

15 **APROS:** So, should the accused be able to operate that
16 sink with one good hand?

17

18 **WIT:** Absolutely.

19

20 **APROS:** Now, the defense has also raised the issue that
21 the accused has not often seen the light of day
22 in his recreation since he's been moved to Camp
23 5. Can you explain how--can you explain the

1 schedule for recreation throughout the day at
2 Camp 5?

3

4 **WIT:** Yes. It is--it rotates--it revolves from tier to
5 tier to tier. Each day where they get a
6 different time of day that they are offered their
7 recreation to go out, so it will move and
8 basically as a detainee, he gets 2 hours out
9 there and we normally take tiers out at a time
10 and we go out. It just--you know, you're in a
11 different block throughout the week--a block of
12 time throughout the week.

13

14 **APROS:** And what time does recreation start in Camp 5?

15

16 **WIT:** We start recreation after call to prayer, 0500 it
17 will start, roughly.

18

19 **APROS:** And what time does it end at night?

20

21 **WIT:** Normally secure at 2200.

22

1 **APROS:** And if someone is in a 5 a.m. to 7 a.m. block of
2 recreation at some point, does that mean that
3 they only get to rec from 5 to 7 for the rest of
4 their time in Camp 5?

5
6 **WIT:** Absolutely not. Absolutely not.

7
8 **APROS:** And how often are they moved--they changed, the
9 times?

10
11 **WIT:** Daily it rotates. We rotate everyday.

12
13 **APROS:** And do you know for a fact that the accused has
14 actually recreated in the--or been offered
15 recreation in the daytime since he was moved to
16 Camp 5?

17
18 **WIT:** Yes, absolutely. It is during morning updates,
19 the camp commanders briefing every morning is a
20 particular question since the issue was raised
21 about a month ago really since I moved him in.
22 No actually since the Captain--I had a discussion
23 with him. I made a note that this was a major

1 matter of concern which I specifically asked are
2 they getting daylight recreation, so I confirm
3 that once, two, three times a week that
4 Commission candidates are getting daylight
5 recreation. And it is our--it is our policy that
6 everyone will get more opportunities to rec
7 during the daylight than the night hours. If by
8 the schedule we can't get them out during the
9 daylight if you're on nighttime rec one night,
10 the next day you'll be first in the cue to get
11 daylight rec.

12
13 **APROS:** And when they recreate at Camp 5, are they able
14 to see other Pre-Commission detainees who are
15 recreating?

16
17 **WIT:** Yes, they are. They are in adjacent recreation
18 areas.

19
20 **APROS:** Okay. Can you describe, as best as you can, the
21 size of the recreation area they give them?
22

1 **WIT:** Initially, I was given the exact dimensions.
2 Give me a second. I would say it's roughly about
3 5 yards wide, 10 yards deep for each individual's
4 recreation area.

5
6 **APROS:** Okay. And are the accused--or are the Pre-Trial
7 detainees--or the Pre-Commission detainees able
8 to touch each other during recreation?

9
10 **WIT:** Well, I--for Commission detainees, in particular
11 those that I have greatest threat of, and there's
12 three individuals that I will not let come in
13 contact at all, we house--there are pens between
14 them so to preclude any kind of touching.

15
16 **APROS:** Now, when Mr. Barhoumi was in Camp 4, what was
17 the process that a defense attorney had to go
18 through in order to see him to help prepare his
19 defense?

20
21 **WIT:** The defense process is to contact our staff judge
22 advocate to say that they need to see a detainee
23 and then the staff judge advocate contacts my

1 operations center and we set the meeting up in
2 Camp Echo.

3

4 **APROS:** So the meeting was in Camp Echo. Can you explain
5 why the meetings are typically in Camp Echo?

6

7 **WIT:** In Camp Echo, it affords the counsel and the
8 detainees a degree of privacy that we couldn't
9 really provide elsewhere. It provides us with a
10 degree of security and it is--we have cameras in
11 all of the cells so that we can watch. There is
12 no audio, but we can watch to ensure the safety
13 of both detainee and counsel.

14

15 **APROS:** Now that the accused is in Camp 5, what is the
16 process for the when his defense attorney wants
17 to come and meet with him?

18

19 **WIT:** Contacts SJA--it's the exact same. Contact the
20 SJA. We move him to Camp Echo and they meet at
21 Camp Echo.

22

1 **APROS:** So the conditions of where he meets with his
2 defense attorney are exactly the same as prior to
3 him moving?
4
5 **WIT:** Absolutely.
6
7 **APROS:** Now, is a charged detainee allowed to keep any of
8 his legal matters with him?
9
10 **WIT:** Yes, he is. He has full access to those.
11
12 **APROS:** And in Camp 5, where--where would those matters
13 be kept?
14
15 **WIT:** Well, detainees have a little bin, a plastic
16 Tupperware type box. Their items are stored in
17 that and there are lockers at the end of each
18 tier where their items are stored and so they can
19 request that. They can have their box brought to
20 them to which they can get access to the
21 materials.
22
23 **APROS:** Can they get that at anytime?

1

2 **WIT:** As long as it's not quiet arms, 2200 and past.

3

4 **APROS:** 2200 until when?

5

6 **WIT:** 2200 until call to prayer.

7

8 **APROS:** To call to prayer is quiet----

9

10 **WIT:** That's our general quiet hours to sleep.

11

12 **APROS:** Now, where would an accused have to keep all of

13 his legal matters if he were in Camp 4?

14

15 **WIT:** He would keep them in his plastic bin and it'd be

16 secured under his bed. And frankly, that is a

17 new area of concern of mine of frankly not a huge

18 overly concern a burden on me, but the detainees-

19 -all of the materials are subject to being rifled

20 through or gone through by any other detainee in

21 that facility. When you're in Camp 5, their

22 materials are secured.

23

1 **APROS:** So what is the difference in the access to the
2 materials that the accused has in Camp 5 as
3 opposed to when he was in Camp 4?
4

5 **WIT:** Well, in Camp 4, he got it immediately and
6 readily available to him 24/7. In Camp 5, he has
7 to ask the guard to bring it to him. Some
8 materials are left with him. We have a--we also
9 have, if it's a large amount, we have one
10 detainee, and I frank--I just don't know the
11 amount of materials he has. But I know one
12 detainee has a very large amount of legal
13 materials, and so we have to hold it elsewhere
14 and then we take him to a reading room, which we
15 offer to any of them if they want. They can go
16 to that room to read, go through the materials to
17 write, do whatever they need.
18

19 **APROS:** So, his ability to help prepare his defense has
20 not been impacted in anyway from his move from
21 Camp 4 to Camp 5?
22

23 **WIT:** I cannot see how it would be.

1

2 **DC:** Objection, speculation.

3

4 **Presiding Officer:** Overruled.

5

6 **APROS:** When you moved the detainee from Camp 4 to Camp
7 5, was it your intention to interfere with the
8 accused/attorney client relationship?

9

10 **WIT:** Absolutely not. By no means.

11

12 **APROS:** Now that the accused is in Camp 5, is there any
13 more of a time delay for the defense to be able
14 to see their client?

15

16 **WIT:** No. We pre-stage the detainee the night before
17 counsel are to arrive. We would move the
18 detainee to Camp Echo such that he is standing by
19 and available as soon as counsel arrives the next
20 day.

21

22 **APROS:** And--and you testified about Army Regulation 190-
23 47 and Army Regulation 190-8, just to make it

1 clear, those aren't actually binding on your
2 operations at GTMO. They're not written
3 specifically for GTMO operations, are they?
4

5 **WIT:** That is--that's absolutely correct. They,
6 frankly when it comes to Army regulations, they
7 have not yet caught up with the environment in
8 which we work, so I have to take pieces of
9 guidance that are closest to my situation and
10 apply them. So I could be criticized for not
11 following one paragraph or a following of a
12 certain paragraph. It is--it's something that
13 just comes with my job. Somebody could say, you
14 shouldn't follow that paragraph or you should,
15 and I--I get that everyday from everybody.

16
17 **APROS:** The defense touched on why you hadn't moved the
18 accused starting in November of 2004, and I
19 believe you testified that you weren't aware of
20 that but that you were aware of when he was
21 eventually charged--oh, I'm sorry, July 2004, but
22 you were aware of when he was actually charged.

1 Are you aware of when he actually had his first
2 Commission session?

3
4 **WIT:** And to answer that question, no. I--I could be
5 wrong or I could be confused. I certainly would
6 have known it at the time. I would have known
7 that at the time he was having a session for me
8 to recall right now, but as I--I think through
9 his case, his all has been very recent within the
10 last 30 days or so before he's been brought here.

11
12 **APROS:** And in your experience, how adept are the other
13 detainees at communicating news to each other
14 about what might be happening in the camps or at
15 the Commission process?

16
17 **WIT:** Extremely good. They are--it's what's known by
18 the guards as Detainee Information Network.
19 Something in Camp 3 will be throughout Camp 5
20 within 7 days.

21

1 **APROS:** So something as news worthy as someone's trial
2 starting might spread around the camp very
3 quickly?

4
5 **WIT:** Absolutely. Without any doubt it will spread
6 very quickly. That is the most common
7 discussions that they have in the block or that
8 I'm aware of is discussions about the Commission
9 process. Anything is news worthy. They will do
10 their best, and frankly there is a technique that
11 they have to help spread the word. They often
12 times will carry out acts of violence against the
13 guard such that they may get to another camp,
14 i.e. Camp 5 if they get news from Camp 3,
15 somebody will commit an offense so they can go to
16 Camp 3 and the same with Camp 4 if they need to
17 get to the word or they will feign illness to get
18 to the hospital so there's various techniques
19 that they use to try to gain information and pass
20 it amongst the detainees.

21
22 **APROS:** Okay. And when an--and when an individual is
23 finally charged, is it a policy of your

1 organization to announce that to everyone in the
2 camp?

3

4 **WIT:** No. It is not.

5

6 **APROS:** So the only way that information would get out is
7 if the accused would tell somebody?

8

9 **WIT:** Absolutely. Well, there are other techniques.
10 Information comes into the camps in various
11 means, so the detainee himself could say it or
12 other--other means in which information gets into
13 the camps.

14

15 **APROS:** But it certainly not the policy of any of your
16 people to announce that to everyone?

17

18 **WIT:** Absolutely not.

19

20 **APROS:** What privileges did the accused have at Camp 4
21 that he doesn't have at Camp 5?

22

1 **WIT:** The greatest--there are two thing. I mean one,
2 he had much greater freedom of movement. He had
3 much longer recreation periods at Camp 4 and he
4 was--in that, was able to commune with his fellow
5 detainees to where he would be side by side
6 during prayer and take meals together. Mealtime
7 at Camp 4 is much like a, easiest way, it's like
8 a family picnic, you know, when you're outside,
9 foods brought to you, you serve it up like a
10 buffet style, and they eat collectively. Again
11 more of that envisioned by the 3rd Geneva
12 Convention.

13
14 **APROS:** Any comforts items he may have had at Camp 4 that
15 he retained with him when he went to Camp 5?

16
17 **WIT:** Comfort items do not change in compliance status.

18
19 **APROS:** Are you familiar with the term "incommunicado"?

20

21 **WIT:** Yes, I am.

22

1 **APROS:** Is it fair to say that the accused is being held
2 in an incommunicado status?

3
4 **WIT:** Absolutely not. He is--he has the ability to
5 speak with counsel be it habeas or Commission at
6 whatever time the lawyers present themselves
7 through an agreement with the SJA. He has the
8 ability to write letters. He has the ability to
9 write ICRC, International Commission Red Cross,
10 messages. He is seen by the International
11 Commission Red Cross, so he is able to
12 communicate through various means external to the
13 camp.

14
15 **APROS:** Now, Colonel, based on your 24 years of
16 experience, do you believe that the accused is
17 being treated in a humane fashion?

18
19 **WIT:** Absolutely. No if, ands, or buts.

20
21 **APROS:** No further questions, sir.

22
23 **Presiding Officer:** Redirect?

1

2 **DC:** Sir, some of the questions from the government,
3 you mentioned that there's still one detainee
4 that's not at Camp 5 and that you do plan to move
5 him over to Camp 5?

6

7 **WIT:** Yes.

8

9 **DC:** Why is he--is he at Camp 1?

10

11 **WIT:** Yes.

12

13 **DC:** Why?

14

15 **WIT:** He's in the----

16

17 **APROS:** Objection, relevance. He's asked and answered
18 this question. He's also said he's gotten close
19 to classified information on this.

20

21 **Presiding Officer:** Captain Faulkner, what's the relevance
22 of the reason why that individual is not in Camp
23 5?

1

2 **DC:** Sir, I think they--I think they opened the door
3 to it when they went into the fact that they've
4 left--that there's still one guy at Camp 5 and
5 it's not apparent to me exactly why he's still
6 there. And if we need to close the session, we
7 can close the session, but it certainly goes to
8 his assertion that they all need to be in one
9 location together.

10

11 **Presiding Officer:** Well, hold on just a sec.

12

13 [Long pause.]

14

15 **Presiding Officer:** He's already answered that question.

16 Please, move on.

17

18 **DC:** You said that you now get daily updates about the
19 rec time that the Pre-Commission detainees are
20 receiving, so was it--was it the procedure before
21 I made my complaints to you that they were only
22 given these 2 hours of rec time early in the
23 morning?

1

2 **WIT:** No. I just made it more of a matter of my
3 visibility over the issue to--to ensure----

4

5 **DC:** Do you know--do you know what their rec time was
6 before I made my complaint to you?

7

8 **WIT:** It was during the--when you said 5 to 7, he was
9 doing 5 to 7.

10

11 **DC:** Everyday?

12

13 **WIT:** I can't give you an honest--I can't answer it. I
14 don't know that for sure.

15

16 **DC:** How much time do you spend at Camp 5, sir?

17

18 **WIT:** Probably, it's very hard to--I'm--I do not live
19 in Camp 5. I don't really stay there. My office
20 is in Camp 1. I visit three or four times a week
21 sometimes it's more, sometimes it's less.

22

1 **DC:** Most of what you know bout Camp 5 and the daily
2 operations are what's being told to you by
3 others?

4
5 **WIT:** No. I set the policy. I mean I established the
6 rules by which it runs. It's through personal
7 observation. It is in large part through what is
8 communicated to me. The daily--I--I, you know, I
9 can't be in all the camps, so I have to rely on
10 the reports back from the camps and I monitor
11 that activity through my headquarters through
12 daily reports but also through a great deal of
13 just walking around.

14
15 **DC:** Are all of the detainees at Camp 5 offered this
16 recreation time everyday?

17
18 **WIT:** Absolutely. Everyone's offered rec everyday.

19
20 **DC:** How do you know?

21

1 **WIT:** Well, unless I have sergeants and colonels who
2 lie to me, they all tell me that and then, I
3 mean, that is the standing rule.
4
5 **DC:** Who--who offers the recreation time?
6
7 **WIT:** The block NCO.
8
9 **DC:** And you mentioned other colonels, are there other
10 colonels that are constantly at Camp 5?
11
12 **WIT:** There's a lieutenant colonel that is responsible
13 directly for Camp 5 and Camp Echo, so his scope
14 of operations is much smaller than what I have to
15 contend with, so he spends a lot more time in
16 Camp 5 than I.
17
18 **DC:** If all of the detainees were to accept their
19 recreation time, there would be no way to give
20 them all 2 hours or even 1 hour a day, would
21 there, at Camp 5?
22

1 **WIT:** If--if we ever ran into that, I would expand the
2 hours. I am--you can--I mean this is not--this
3 has been my personal initiative, one of those
4 things, again, it's just to where I go to safe
5 and to secure custody and improve the quality of
6 life. I have made it one of my driving forces to
7 get them the 2 hours. When I took command, they
8 were only getting 30 minutes--30 minutes and I
9 don't know if it was everyday of the week.

10

11 **DC:** In response to some of the prosecution's
12 questions you answered that Mr. Barhoumi has
13 essentially the same access to me and the same
14 ability to assist in this case.

15

16 **WIT:** Yes.

17

18 **DC:** Do you understand that Mr. Barhoumi might
19 understandably be upset that he was moved from
20 Camp 5 to Camp 4?

21

22 **APROS:** Objection, calls for----

23

1 **DC:** Or excuse me, from 4 to 5.
2
3 **APROS:** ----speculation and is----
4
5 **Presiding Officer:** I'm sorry. Finish your question.
6
7 **DC:** That he might be upset about his move from Camp 4
8 to Camp 5.
9
10 **Presiding Officer:** And the objection is?
11
12 **APROS:** My objection's twofold, one, it calls for
13 speculation on the part of the Colonel to figure
14 out whether or not the accused is upset about
15 something and two, the accused being upset about
16 something is really irrelevant to any legal issue
17 before you in the motion, sir.
18
19 **Presiding Officer:** Well, Captain Faulkner.
20
21 **DC:** It goes--sir, whether or not he's upset goes to
22 the very impact on the attorney/client
23 relationship that's the basis of our motion and

1 the Colonel has expressed that he's familiar with
2 camp operations what one camp is like versus
3 another camp. I think he has it within his
4 knowledge to know whether or not somebody might
5 be upset about moving from Camp 4 to Camp 5.
6

7 **Presiding Officer:** Well, I believe your question was, "did
8 he understand someone might reasonably be upset,"
9 I don't find that speculative and I do find that
10 it is at least one potential impact for the move.
11 I'll overrule the objection and allow the
12 question.
13

14 **APROS:** Yes, sir.
15

16 **Presiding Officer:** You may answer.
17

18 **WIT:** Detainees are upset of me for any kind of move.
19 Would he be reasonably upset, he could well be.
20 Another one would not be.
21

22 **DC:** And you understand that if he is upset--if--if--
23 if he participates in a Commission proceeding and

1 you--and you admitted that you didn't move him
2 until his proceedings kind of started. He
3 participates in a Commission proceeding and days
4 later or a few weeks later he's moved from 4 to 5
5 and upset about that. Do you not see that that
6 could have an impact on the attorney/client
7 relationship?

8
9 **WIT:** I frankly don't because it's a strong position of
10 mine that custodial operations consistent what I
11 understand, I'm not a lawyer, but consistent with
12 everything I know from the corrections world and
13 I have studied corrections in my education is
14 that custodial matters are handled and are
15 separate from judicial matters. Courts can
16 intervene and so he should not make a distinction
17 of how I run my camp and how I run that camp is
18 more under the executive realm has anything to do
19 with judicial matters. If he does not understand
20 that, then I would think it would be incumbent on
21 counsel to explain to him that you have nothing
22 to do with me and I have nothing to do with you.

23

1 **DC:** But do you understand how--how a detainee might
2 think that?

3
4 **WIT:** No, I do not understand how a detainee
5 understands if someone explains to him what it
6 is. He knows me. He knows me. Just as every
7 other detainee out there knows, they know I do
8 not lie. They know--I have never lied to a
9 detainee and if I tell him, and he can look at me
10 know if he would like, I would tell him now you
11 have nothing to do with this. It is not your
12 decision. I did not consult with you. I
13 consulted with no one external to the Joint Task
14 Force. It is strictly a decision I made based on
15 his safety and his security. And he knows I'm
16 sincere in that.

17
18 **DC:** Did you consider consulting with me?

19
20 **WIT:** No, I did not. I did not see it appropriate. No
21 correctional facility in the United States
22 consults with attorneys before they make moves of
23 detainees or inmates. I have done a wide search.

1 I was actually laughed at by correctional people
2 when they said they consulted with attorneys
3 prior to moving their inmates.
4

5 **DC:** Did you consider telling the defense attorneys
6 for the detainees who were being moved prior to
7 the move?
8

9 **WIT:** I did not because I did not see that it
10 concerned----
11

12 **DC:** You didn't see it as a concern or you didn't
13 think it was germane to the issue of moving?
14

15 **WIT:** Germane. I did not see it as germane. I did not
16 also see it as appropriate that I would consult
17 with you in any manner about that.
18

19 **DC:** Were the detainees told in any advance--were they
20 given any advance notice that they were being
21 moved?
22

1 **WIT:** We do not give detainees any advance notice on
2 moves.

3
4 **DC:** Were they told why they were being moved?

5
6 **WIT:** We normally do not tell detainees why they are
7 being moved.

8
9 **DC:** So if Mr. Barhoumi's move from 4 to 5, his
10 attorney's never been told and he's not being
11 told why he's being moved, do you understand that
12 he could view that as punishment? He's being
13 moved from the camp where he's worked so hard to
14 be, abiding by the rules, and now he's being
15 moved to Camp 5. Do you not see that he might
16 see that as punishment?

17
18 **WIT:** There is a large "if" there. If he did not
19 recognize that everybody on his tier is not a
20 Commission's candidate, within a matter of
21 minutes I would speculate that everyone there
22 came to the quick conclusion that we're all here
23 for one reason. The detainees are much smarter

1 than anyone wants to give them credit for.
2 They're IQ goes far beyond mine, I think.
3
4 **DC:** But--but all of the Commission detainees weren't
5 there, were they?
6
7 **WIT:** On the tier that he was moved to, only Commission
8 detainees were there.
9
10 **DC:** But not all of them?
11
12 **WIT:** All but the ones that we have spoken about
13 previously.
14
15 **DC:** But--and--and the detainees were not told here's
16 why the other two aren't here?
17
18 **WIT:** We--we don't really exchange that type of
19 information with detainees.
20
21 **DC:** You said that you moved him and--and part of it
22 was that you had overlooked it and--and you
23 hadn't moved him sooner----

1

2 **APROS:** Objection, sir. We're way outside of the scope
3 of my cross.

4

5 **Presiding Officer:** Captain, you are straying back into
6 your direct rather than responding to cross-
7 examination. Let me ask you to tighten up your
8 questions.

9

10 **DC:** Yes, sir. Sir, the government did ask a question
11 about when he actually became aware of the
12 proceedings. I'd like to explore that just a
13 little bit.

14

15 **Presiding Officer:** Very well.

16

17 **DC:** You said that Mr. Barhoumi's proceedings you
18 came--you became aware of once they started a
19 relatively short time ago?

20

21 **WIT:** [The witness nodded his head in the affirmative.]

22

23 **DC:** One of the other detainees, Khadr, was in Camp 4?

1

2 **WIT:** Yes.

3

4 **DC:** And are you aware that he had a proceeding the
5 week of 10 January?

6

7 **WIT:** I am.

8

9 **DC:** And yet he wasn't moved from Camp 4 to Camp 5
10 until the end of March?

11

12 **WIT:** That's correct.

13

14 **DC:** Is--is there--was--was his safety ever in
15 question during the time period that he wasn't
16 moved?

17

18 **WIT:** At that time frame, in my opinion, he was under
19 general threat and should have been moved.

20

21 **DC:** And why wasn't he?

22

1 **WIT:** My move of him to Camp 5 was, at that time, I was
2 told to wait.
3
4 **DC:** You were going to move him?
5
6 **WIT:** I wanted to move him.
7
8 **DC:** And you were told to wait by whom?
9
10 **WIT:** By the Commanding General.
11
12 **DC:** Why?
13
14 **WIT:** I can't speculate as to the reason.
15
16 **DC:** So--and when was that that you wanted to move
17 him?
18
19 **WIT:** In Khadr's instance, soon--in his instance as
20 soon as I became aware, and I can't put the date
21 to it, I wanted to move him immediately because
22 he was in a minimum security facility. My
23 concern, at that point, was he was in a minimum

1 security facility on trial--going before trial
2 for a serious felony which would require being
3 placed in maximum security.
4
5 **DC:** But why wasn't he moved?
6
7 **WIT:** I can't speculate. I was told let's do not move
8 him.
9
10 **DC:** And do you recall--was it sometime after his
11 hearing?
12
13 **WIT:** The discussion about his placement in camps went
14 on for a period of time from the day of his
15 arrival all the way up. He was always a point of
16 contention between me and my superior.
17
18 **DC:** So you knew that there was a hearing in Khadr.
19 You wanted to move him and somebody said, "no"?
20
21 **WIT:** That's correct.
22

1 **DC:** And at--at that time, were you not aware that
2 there were other hearings going on? Were you not
3 aware that Mr. Barhoumi was scheduled for
4 hearings and that you could have moved him
5 earlier as well?
6

7 **WIT:** In my recollection, I don't--I can't--can't put
8 the date of which I became aware of Mr.
9 Barhoumi's being a Commission's candidate. I
10 wish I could, but I can't put when that came to
11 my knowledge. I--I only ask that you understand
12 I deal with close to 500 of them and I deal with
13 issues every 10 seconds and it's very difficult
14 for me to put them all and get them organized in
15 my mind correctly.
16

17 **DC:** If--if the movement was so important--if this
18 movement of Pre-Commissions--if this
19 consolidation of Pre-Commissions is so important,
20 why did it take that long to get it done? Why--
21 why--I guess let me ask that question first.
22

23 **WIT:** Could you just restate what the----

1

2 **DC:** Why did it take that long--why did it take so
3 long to get it done if--if this is such an
4 important safety issue?

5

6 **WIT:** Again, it's my failure to get them all
7 consolidated and put into one place. That was my
8 failure for not--for not having done it.

9

10 **DC:** Do--do you control the movement of detainees
11 between camps?

12

13 **WIT:** I do but they can be vetoed, so at the end, am I
14 the ultimate decision maker on it? The
15 Commanding General can reach down and stop--stop
16 anything that I do.

17

18 **DC:** Is the Commander General a correction officer?

19

20 **WIT:** No. He is not.

21

22 **DC:** Do you know what branch he is?

23

1 **WIT:** He's--he was an artillery officer.
2
3 **DC:** He was artillery and the current?
4
5 **WIT:** He is a Navy Admiral.
6
7 **DC:** And do you know what his branch or----
8
9 **WIT:** No. He's an aviator.
10
11 **DC:** Thanks, sir. I don't have any further questions.
12
13 **Presiding Officer:** Any recross?
14
15 **APROS:** No, sir.
16
17 **Presiding Officer:** Very well. Is this witness subject to
18 recall?
19
20 **APROS:** Not from the government, sir.
21
22 **DC:** I'd like him temporarily excused, sir.
23

1 **Presiding Officer:** Very well. Colonel, I'm going to allow
2 you to step down. Please, do not discuss your
3 testimony with anyone outside the courtroom other
4 than counsel----

5
6 **WIT:** Yes, sir.

7
8 **Presiding Officer:** ----pending your potential recall.

9
10 **WIT:** Yes, sir.

11
12 **Presiding Officer:** You may step down. Thank you for your
13 testimony.

14
15 [The witness withdrew from the courtroom.]

16
17 **Presiding Officer:** Captain Faulkner, did you have
18 additional evidence you'd like to present?

19
20 **DC:** Yes, sir. The defense calls Mr. Barhoumi.

21
22 **Presiding Officer:** How long do you expect this examination
23 will take?

1

2 **DC:** I think--I think a break would probably be
3 appropriate, sir.

4

5 **Presiding Officer:** Should we break for lunch?

6

7 **DC:** That's probably a good idea, sir.

8

9 **Presiding Officer:** Does the prosecution concur?

10

11 **APROS:** Yes, sir.

12

13 **Presiding Officer:** Very well. The Commission will be in
14 recess for lunch. We'll reconvene at 1300.

15

16 **DC:** 1300, sir?

17

18 **Presiding Officer:** Yes. The Commission's in recess.

19

20 *The Commission Hearing recessed at 1134, 26 April 2006.*

21

22 *The Commission Hearing was called to order at 1328, 26*

23 *April 2006.*

1

2 **Presiding Officer:** This Commission will come to order.

3

4 **APROS:** All parties present when the Commission recessed
5 are again present.

6

7 **Presiding Officer:** Captain Faulkner, you may proceed.

8

9 **DC:** Sir, the defense calls Mr. Barhoumi.

10

11 **Presiding Officer:** Very well.

12

13 **The accused was called as a witness for the defense, was**
14 **sworn, and testified as follows:**

15

16 **DC:** Mr. Barhoumi, how long have you been here at
17 Guantanamo?

18

19 **ACC:** Almost 4 years.

20

21 **DC:** And in that time, have you have been detained at
22 Camp 4?

23

1 **ACC:** I don't understand the question.

2

3 **DC:** Have you ever lived at Camp 4?

4

5 **ACC:** Yes, I did.

6

7 **DC:** How long did you live at Camp 4?

8

9 **ACC:** Almost a year, maybe less than a year.

10

11 **DC:** And were you moved to Camp 5 approximately 1

12 month ago?

13

14 **ACC:** Yes.

15

16 **DC:** Prior to moving to Camp 5, did you cause any

17 problems at Camp 4?

18

19 **ACC:** No, no, not at all.

20

21 **DC:** Were you threatened in anyway at Camp 4?

22

23 **ACC:** No, I was not subjected to any threat.

1

2 **DC:** Did you ever try to escape from Camp 4?

3

4 **ACC:** No, I did not try to escape.

5

6 **DC:** Did you ever try to hurt yourself or take your
7 own life at Camp 4?

8

9 **ACC:** No, not at all.

10

11 **DC:** When you were moved to Camp 5, did anybody inform
12 you of the reason for your movement?

13

14 **ACC:** No, they did not give me any idea. They came to
15 me. All of a sudden they asked me to pack my
16 things. I asked why but I got no response.

17

18 **DC:** Did they allow you to pack all of your things?

19

20 **ACC:** I did not pack fully. I did leave some of my
21 things over there.

22

1 **DC:** Have you ever gotten any of those things that you
2 left at Camp 4 delivered to you at Camp 5?
3
4 **ACC:** No, no, they did not.
5
6 **DC:** What did you think when you were being moved to
7 Camp 5?
8
9 **ACC:** I thought I was punished.
10
11 **DC:** Why did you think that?
12
13 **ACC:** Because Camp 5 is known for being punishment
14 place. Everybody knows that.
15
16 **DC:** What are the differences at Camp 5 then Camp 4
17 that make living more difficult for you?
18
19 **ACC:** There is a huge difference between Camp 4 and
20 Camp 5. There are many privileges in Camp 4.
21 You have a lot more freedom and this has an
22 impact on your physical condition as well as your
23 psychological condition.

1

2 **DC:** Has your physical condition deteriorated since
3 you went to Camp 5?

4

5 **ACC:** Yes, it deteriorated a lot.

6

7 **DC:** In what way?

8

9 **ACC:** I find things more difficult. My--I want to show
10 you my hand. I find it very difficult to use the
11 toilet. It is different than that in Camp 4
12 because this one is--I have to push the button
13 and when I use--when I go to the bathroom and I
14 use the toilet, there is no other way except
15 using this hand because I use the other hand for
16 cleanliness.

17

18 And the other thing is that my hand is weak. The
19 nerves is, the skin is weak, my bones, my bones
20 hurt every time I use my hand--my finger to push
21 the button it hurts and it causes me a lot of
22 pain and I wound myself.

23

1 The other thing is the air condition. The cold
2 does affect my hand. If somebody was to touch my
3 hand, this hand and the other hand, you will find
4 that there is a great difference. This hand is
5 much more colder and this will affect my nerves
6 and it causes me a lot of pain.

7

8 And excuse me for talking and discussing this but
9 when I do go to the toilet, I have to use water
10 for cleanliness and I have to use water on the
11 inside rather on the outside and sometime I just
12 don't eat because I don't want to use the
13 bathroom.

14

15 **DC:** And when you say, "water on the inside," you mean
16 from the inside of the toilet?

17

18 **ACC:** Yes, inside the toilet.

19

20 **DC:** What about the sink at Camp 5, is it also the
21 kind where you push a button?

22

1 **ACC:** Yes, it is all through pushing a button, whether
2 it was the sink or using the faucet and it is
3 very difficult to use because it is not like easy
4 to use.

5

6 **DC:** Is the button on Camp 5 more difficult to push
7 than the button on the faucets at Camp 4?

8

9 **ACC:** There is a huge difference because at Camp 4
10 there are just regular faucets; you just push and
11 it is very easy to use.

12

13 **DC:** If you experienced any problems at Camp 4, did
14 you have any friends that could help you out at
15 Camp 4 with using the faucets?

16

17 **ACC:** Yes, they used to help me a lot. They used to
18 help me wash my clothes as well as other things.
19 They were always there to help me.

20

21 **DC:** Mr. Barhoumi, how has the move to Camp 5 affected
22 your relationship with me?

23

1 **ACC:** I was really surprised by the move. I was not
2 expecting it and it was so contradictory because
3 I did have a good relationship. I use to talk to
4 him. I was with him. They never mentioned
5 anything. And once I moved I had already started
6 to get some trust with my attorney, however, with
7 this move, I did start to lose this trust with my
8 attorney because I did not know what was going on
9 and I did not expect it.

10

11 **DC:** Thank you, Mr. Barhoumi I don't have any further
12 questions for you but the prosecution may have
13 some questions for you.

14

15 **Presiding Officer:** The prosecution may cross-examine.

16

17 **APROS:** Thank you, sir.

18

19 Mr. Barhoumi, you have allowed your defense
20 counsel to file this motion on your behalf,
21 correct?

22

1 **ACC:** Yes, I did. I asked him to do that on my behalf
2 because I felt that he understood me and I
3 explained what was going on with me and I asked
4 him to file it on my behalf.

5
6 **APROS:** So you had many conversations with him leading up
7 to this motion?

8
9 **ACC:** Yes.

10
11 **APROS:** And you heard the colonel testify today, and your
12 defense counsel asked him many questions?

13
14 **ACC:** Yes, I head him but there were a lot of things
15 that I could have talked about as well.

16
17 **APROS:** And you prepared for your testimony today with
18 your defense counsel, correct?

19
20 **ACC:** Yes.

21
22 **APROS:** So you were able to work with him in putting
23 forth this legal motion?

1

2 **ACC:** Yes, and I have cooperated with him since the
3 beginning since I have a problem and I have
4 explained it to him and I gave him a chance to
5 try to help me out.

6

7 **APROS:** And he did try to help you out today, correct?

8

9 **ACC:** Yes, he did try to help me, but I am still
10 waiting for the outcome.

11

12 **APROS:** And he met with you many times in Camp Echo prior
13 to today?

14

15 **ACC:** Yes, I think it was once or twice.

16

17 **APROS:** So when he was down here, he was able to see you
18 and talk to you about your case?

19

20 **ACC:** Yes, he did and we were both surprised about the
21 move and he asked me to give him a chance so he
22 can prove to me that he can help me and that he
23 didn't know about the move either.

1

2 **APROS:** So your ability to prepare for your case today

3 wasn't impacted at all by your move to Camp 5,

4 correct?

5

6 **ACC:** Of course it was affected. This problem would

7 not have existed today if it weren't for the

8 move. The captain, although he is trying to help

9 me, does not feel what I am feeling because it is

10 my hand and it my pain.

11

12 **APROS:** And we will get to your hand in a second, I just

13 want to make sure that in no way, your ability to

14 prepare for trial was affected by your move?

15

16 **ACC:** Yes, this is obvious.

17

18 **APROS:** You had mentioned that you had left some things

19 over at Camp 4 when you were moved?

20

21 **ACC:** Yes.

22

23 **APROS:** What did you leave over there?

1

2 **ACC:** I left several stuff there such as clothes, and
3 documents, and stuff to clean with. Stuff like
4 that, different things.

5

6 **APROS:** Did you ever ask the staff at Camp 5 if you could
7 have that stuff back?

8

9 **ACC:** I have tried asking them for smaller requests
10 than that but they don't care and there is no
11 chance for me to try to approach them and ask
12 them for things. They have not resolved even
13 smaller issues.

14

15 **APROS:** Okay, that wasn't my question. My question was
16 did you ask them specifically for the stuff that
17 you left?

18

19 **ACC:** Yes, I did.

20

21 **APROS:** Now, you said you had no idea when you were moved
22 why you were moved.

23

1 **ACC:** Yes, that is correct. I didn't have any idea and
2 I asked them and they did not respond.

3
4 **APROS:** But you were able to communicate with other
5 people on your block in Camp 5--other detainees,
6 correct?

7
8 **ACC:** It is very hard to communicate. There is only a
9 small area in the door where you can talk to
10 other detainees and I talk very little as well.
11 You can review all the reports and ask the
12 guards, I speak very little and it's hard to
13 communicate with other detainees.

14
15 **APROS:** But you could have talked to them if you wanted
16 to, right?

17
18 **ACC:** The conditions does not encourage anybody to
19 speak because the air condition is loud and you
20 need to speak very loud in order to be heard and
21 it will hurt your throat and it's just not
22 convenient.

23

1 **APROS:** Well, isn't the call to prayer lead by one of the
2 people on the block for everyone to pray?
3
4 **ACC:** Yes. When they open the little window it's time
5 for prayer. Not to all people just for the Imam
6 and the Mu'azen.
7
8 **APROS:** And you have no problem hearing them?
9
10 **ACC:** It's--it's not that easy.
11
12 **APROS:** You discussed your recreation time and how you
13 were in better physical shape at Camp 4 than at
14 Camp 5. Is that correct?
15
16 **ACC:** Yes. It is correct.
17
18 **APROS:** What type of recreation did you do at Camp 4?
19
20 **ACC:** I did a lot of recreational activities. I was
21 outside, of course inside in the fence, and I
22 had--I got a lot of sun. There was also the air
23 conditioning which helped keep me healthy and I

1 had a lot of freedom of movement and I was--which
2 also allowed me to be relaxed and to be able to
3 think of my case and think of different things.

4

5 **APROS:** You have 2 hours of recreation at Camp 5 now if
6 you want it, right?

7

8 **ACC:** Yes.

9

10 **APROS:** And do you always take all 2 hours?

11

12 **ACC:** Sometimes I do depending on the guards and what
13 time they bring me out because sometimes they
14 bring me out at night.

15

16 **APROS:** I'm sorry, I didn't hear that last part, sir.

17 That last line, I didn't hear. The last line
18 from the translation I didn't hear.

19

20 **Presiding Officer:** Would the translator, please, repeat
21 the last response?

22

1 **Translator:** I go outside sometimes for a couple of hours
2 but sometimes they bring me out at night.
3
4 **ACC:** Most of the time they used to take me out at
5 night not during the daytime.
6
7 **APROS:** But you're free to exercise at night there,
8 correct?
9
10 **ACC:** I don't exercise. I have a poor health and
11 physical condition. I can't even eat sometimes
12 so I can't think of that even.
13
14 **APROS:** So then you haven't lost the ability to exercise
15 from the move to Camp 4 from Camp 5?
16
17 **ACC:** I can't. It is cold and due to the conditions
18 that I have explained to your previously I have
19 very poor condition and I have a tough case. I
20 can't do it.
21
22 **APROS:** You mentioned that your hand sometimes gets cold
23 and it causes you pain.

1

2 **ACC:** [Holding up his left hand and showing it.]

3

4 **APROS:** Let the record reflect that the accused is
5 pointing to his damaged hand and where the two
6 knuckles are.

7

8 **ACC:** My hand is not sometimes cold. It is always
9 cold. If you touch it right now and touch the
10 other hand, you will feel that the temperature on
11 that is colder because of the nerves and the bone
12 damage. It is always cold and it hurts me. Even
13 you can see the scars and the wounds on my hands
14 right now. Every time I touch it, I use it, it
15 is so sensitive that I wound myself.

16

17 **APROS:** Have you ever asked to go to the doctor to have
18 your hand checked?

19

20 **ACC:** I see the doctor previously and I seen a lot of
21 doctors before. The only thing that can help is
22 being in normal conditions, being in the sun,
23 being in normal conditions, and sometimes using

1 cream on my hand to be able to help the--relieve
2 the pain.

3

4 **APROS:** Have you ever asked for any cream?

5

6 **ACC:** I did and they did give me a cream--a cream to
7 use; however, it is not really helping because my
8 problem is much bigger than that.

9

10 **APROS:** Have you ever asked for anything to keep your
11 hand warm, to wrap it in to keep it warm? I saw
12 that you were wearing something on your hand when
13 you came up here today. Does that keep your hand
14 warm?

15

16 **ACC:** [Holding up the bandage that is covering his
17 hand.] I will go ahead and explain the medical
18 matter to you right now, exactly what the problem
19 with my hand is and that's what the doctors have
20 told me. Some of the numbness in my hand, I have
21 no feeling in that hand because the blood does
22 not circulate properly. Part of my hand also has
23 a lot of allergies in it where the blood does

1 circulate, but whatever it is, it will always be
2 cold whether the weather outside is hot or cold,
3 my hand, because the blood does not circulate, my
4 hand will always cause a problem.

5

6 **APROS:** So you're hands going to hurt you regardless of
7 whether or not you're in Camp 4 or Camp 5,
8 correct?

9

10 **ACC:** In Camp 4, I didn't have the problem of pushing
11 so hard on my hand, and therefore I was using it
12 less. In Camp 5, I have the problem that I need
13 to use it and push hard on it and also this
14 creates a problem for me. Everybody knows that
15 most of the sick people or people who are having
16 health problems they take to Camp 4 because it is
17 easier to be and--and also because of the sun.
18 When the sun is out there, I have my hand out in
19 the sun. It doesn't create that big of a problem
20 for me.

21

1 **APROS:** But during your rec time at Camp 5, if it's
2 during the day, you can get up to 2 hours of
3 sunshine a day, correct?

4
5 **ACC:** That is correct. But I have a question for you.
6 Out of 24 hours a day, I only get 2 hours outside
7 in the sun. The rest of the time I am sitting in
8 my room and the air condition is too cold. You
9 see my hands right now. You tell me how would--
10 do you know what I feel like with only 2 hours in
11 the sun and the rest of the time I am in my room
12 inside the cold--inside in cold air condition?

13
14 **APROS:** While I would like to engage in a conversation,
15 I'm going to ask the questions, okay, and you're
16 going to answer. If you wore gloves on your
17 hands, would that help your condition in Camp 5?

18
19 **ACC:** It is too cold. It does not help. I am wearing
20 it right now and it does not help.

21
22 **APROS:** Have you ever asked for a heavier warmer glove?

23

1 **ACC:** [Putting his bandage back on his hand.] Yes,
2 I've previously asked, but nothing.
3
4 **APROS:** Do you recall when you asked?
5
6 **ACC:** I don't remember. It was a while ago.
7
8 **APROS:** Now the toilets in Camp 4 also had a push button,
9 correct?
10
11 **ACC:** Yes, there is a button, but it is quite different
12 from the other one. This one is easier to push
13 and if you push it, the water will continuously
14 run for a short period of time. The other one
15 you need to push harder on and it's quite
16 different. As for the toilet, excuse me, for
17 mentioning that, but it's also easier. The other
18 one is on the ground while the one at Camp 5 is
19 higher and tougher to use.
20
21 **APROS:** Did you ever ask any of the guards to make it
22 easier for you to flush the toilet?
23

1 **ACC:** Yes. I did.

2

3 **APROS:** And last month after your attorney raised it with
4 the Colonel, who testified today, isn't it true
5 that it was fixed within a few hours and that it
6 could--and that the water would stay on longer?

7

8 **ACC:** Yes. It is true they did come to fix it, but it
9 was the same--it's still the same. It's still
10 the same sink. It's still the same toilet.
11 There is no difference.

12

13 **APROS:** You mentioned that when you went to Camp 5, you
14 felt you were being punished, and you heard the
15 Colonel testify today that the reasons that you
16 were moved were for security.

17

18 **ACC:** I've been here for 4 years and for 4 years I've
19 lived in different places and I almost--I lived
20 for almost a year in Camp 4. There is no secrets
21 here. I never created any problems. There was
22 never any problems. I thought that it was a
23 punishment because I was operating for--with the

1 Military Commission I was cooperating with them
2 and I was talking to them. I didn't know what
3 was going on.
4

5 **APROS:** So, you thought it was because of your
6 cooperation, but actually now, are you convinced
7 that it was for your security that that's why JTF
8 moved you?
9

10 **ACC:** My stand is still the same. Camp 5 is a place
11 for punishment and I am being punished right now.
12 Everybody knows that Camp 5 is the punishment
13 place. They used to threaten us that if you
14 disobeyed or you did something wrong, you will be
15 taken to Camp 5.
16

17 **APROS:** Do you believe that the Colonel today was lying?
18

19 **ACC:** I did not say, "lying". I never said the word
20 "lying". This is fact. I am basing my words and
21 my statement on facts. If you go there yourself,
22 you will notice what I'm talking about. You can
23 ask the officials. You can ask anyone. This is

1 a fact. I don't know anything about the Colonel
2 if he's lying or not lying. I'm just saying I'm
3 basing what I'm telling you right now on fact and
4 everyone knows that.

5

6 **APROS:** During the last session, you authorized your
7 defense counsel to tell the press that you were
8 born with your hand deformity. Is that true?

9

10 **ACC:** Whatever the attorney said, these are private
11 things related to me that I would not like to
12 discuss.

13

14 **APROS:** Well, while I understand some things you tell the
15 attorney is private, if you authorize him to say
16 it to the press, it is no longer private. So I
17 ask you again, did you authorize him to say that
18 you were born with your hand deformity?

19

20 **ACC:** Yes, of course, I authorized him. Every time he
21 takes a step, he comes and consults with me and
22 there's always discussions between us.

23

1 **APROS:** Do you remember going to your Combatant Status
2 Review Tribunal?
3

4 **ACC:** Yes. It was either in 2003 or the beginning of
5 2004. I don't recall the exact dates.
6

7 **APROS:** Do you remember telling the Combatant Status
8 Review Tribunal that your hand was blown off by a
9 landmine in Afghanistan?
10

11 **ACC:** Yes, I did discuss my hand, but I don't
12 understand the relevance of this. Why are we
13 bringing my--the reason of my hand being like
14 that into the conversation right now.
15

16 **APROS:** Please, just answer the question. Do you
17 remember telling them that your hand was blown
18 off by a landmine in Afghanistan?
19

20 **ACC:** Yes, I did tell them several things. I did.
21

22 **APROS:** And was that one of them?
23

1 **ACC:** Yes, but I have motives to tell them that.

2

3 **APROS:** But were you telling them the truth?

4

5 **ACC:** Yes, I have always said the truth. You can
6 review my statements since I came here 4 years
7 ago and everything is consistent. Everything is
8 the truth.

9

10 **APROS:** Well how is it the truth that you told them that
11 your hand was blown off by a landmine in
12 Afghanistan and it is also the truth that you
13 told your defense counsel to tell the press that
14 you were born with your hand deformity? They
15 both can't be the truth, can they?

16

17 **ACC:** I have authorized my attorney to say whatever I
18 thought was best for me and whatever he thinks is
19 best for me and until today, they keep telling me
20 they have a lot of evidence that is classified
21 against me that I have not yet seen. I don't
22 know what is going on.

23

1 **APROS:** But that is not the question. The question I
2 asked was, how can both of those statements be
3 the truth? Which one is the truth and which one
4 is a lie?
5
6 **ACC:** The first statement that I said was the correct
7 one, the truth.
8
9 **APROS:** And which one was that?
10
11 **ACC:** The one that you are discussing now.
12
13 **APROS:** That you were born with your hand or that you
14 blew it off with a landmine?
15
16 **ACC:** It was blown off with a landmine.
17
18 **APROS:** No further questions.
19
20 **Presiding Officer:** Redirect.
21

1 **DC:** Mr. Barhoumi, have you ever told me that your
2 hand, that you were born with your hand like it
3 is now?
4
5 **ACC:** I never said this. I never told you this.
6
7 **DC:** And do you know what was printed in the press?
8
9 **ACC:** No, I do not, and if you review my papers, you
10 will not find anything related to that.
11
12 **DC:** Now we have met twice this week, is that correct?
13
14 **ACC:** Yes, this is correct.
15
16 **DC:** We met on Monday and then we met again on
17 Tuesday, correct?
18
19 **ACC:** Yes, this is correct?
20
21 **DC:** And on those 2 days, what were your proceedings
22 about proceeding today?
23

1 **ACC:** I was really upset and I was really not happy. I
2 wanted to come here and meet with the judge and
3 talk to the judge about my condition. It is not
4 a good condition and I would like something to be
5 done.

6

7 **DC:** Did I spend most of the time on those 2 days
8 trying to convince you to let me ask the judge to
9 move you back to Camp 4?

10

11 **ACC:** Yes.

12

13 **DC:** And was it just this morning that you would allow
14 me to do that and it was then that we decided
15 that you would testify today?

16

17 **ACC:** Yes, this is true.

18

19 **DC:** Yesterday when we met, were you considering not
20 cooperating in this proceeding and perhaps
21 boycotting this proceeding because of your move
22 to Camp 5?

23

1 **APROS:** Objection. Relevance. It doesn't matter what he
2 was considering. He did, in fact, cooperate. He
3 did, in fact, do--he did allow this motion to go
4 forward. What he was thinking yesterday really
5 should have no bearing at this point.

6

7 **Presiding Officer:** Captain Faulkner?

8

9 **DC:** Sir, the government, in their questions, is
10 implying that Mr. Barhoumi and I have had these
11 extensive discussions about this motion, when the
12 fact of the matter is most of the time I spent
13 with him has been spent trying to convince him to
14 even go forward with the motion, not the
15 particulars of how we were going to litigate the
16 motion.

17

18 It goes to the very disruption of the attorney-
19 client relationship that this move to Camp 5 has
20 caused. Instead of spending productive time with
21 Mr. Barhoumi, I spend all of my time trying to
22 convince him to allow me to represent him and to

1 allow me to bring motions on his behalf and to
2 allow me to go forward in this proceeding.
3

4 **Presiding Officer:** Well it is pretty far a field but I am
5 inclined to give you the latitude to give you the
6 latitude on your motion. So, you may proceed and
7 ask the question.
8

9 **DC:** Mr. Barhoumi, as late as yesterday weren't you
10 considering not cooperating, not participating,
11 and perhaps boycotting this proceeding?
12

13 **ACC:** God only knows how confused I was against this
14 procedure and this motion. I wanted to boycott
15 the procedure. I was totally convinced that I
16 did not want to appear until yesterday, and the
17 day before yesterday, you talked with me a lot
18 and until I came in this morning into the room
19 outside this wall and I told him, "Okay, I will
20 give you the chance to help me and I will give
21 you the chance the defend me."
22

1 **DC:** Thank you, sir. I don't have any further
2 questions.

3

4 **Presiding Officer:** Any re-cross?

5

6 **APROS:** No, sir.

7

8 **Presiding Officer:** Thank you, Mr. Barhoumi, you may step
9 down and resume your place at the defense table.

10

11 [The accused did as directed.]

12

13 **Presiding Officer:** Captain Faulkner, you may proceed.

14

15 **DC:** Sir, the defense would request a brief recess. I
16 would like to consult with some of the members of
17 the media who may be here who may have written
18 that story and if they are here, I may, in fact,
19 call them to explain the discrepancy between what
20 was printed in the media and what was discussed
21 between me and my client.

22

23 **Presiding Officer:** What else do you have to present?

1

2 **DC:** I have nothing further, sir.

3

4 **Presiding Officer:** Does the government anticipate a

5 rebuttal case?

6

7 **APROS:** No, sir.

8

9 **Presiding Officer:** So it is your expectation that if you

10 are given some time, you may have a witness, you

11 may not, but at that time you are ready to argue

12 your motion?

13

14 **DC:** That is correct, sir.

15

16 **Presiding Officer:** Is the government ready to respond?

17

18 **APROS:** Yes, sir.

19

20 **Presiding Officer:** Very well, then I would like to do two

21 things; how long do you think you need Captain

22 Faulkner?

23

1 **DC:** I think I can determine if there is someone here
2 who can testify in probably 15 minutes or less,
3 sir. And, if they are going to testify I would
4 like to sit down with them briefly and just
5 discuss the basic nature of the testimony.

6

7 **Presiding Officer:** Does the prosecution need to do the
8 same?

9

10 **APROS:** Yes, sir.

11

12 **Presiding Officer:** All right, well it is 1420, that is
13 2:20 pm, I will give you 30 minutes. I would
14 like to see, however, I would like to see counsel
15 before you do that so that we can discuss the
16 order of proceedings for the rest of the day.

17

18 So, the Commission will be in recess, why don't
19 we say until 3 o'clock. The Commission is in
20 recess.

21

22 *The Commission Hearing recessed at 1421, 26 April 2006.*

23

1 *The Commission Hearing was called to order at 1503, 26*
2 *April 2006.*

3

4 **Presiding Officer:** This Military Commission is called to
5 order.

6

7 **APROS:** All parties present when the Commission recessed
8 are again present.

9

10 **Presiding Officer:** Captain Faulkner, you may proceed.

11

12 **DC:** Sir, the defense has no further evidence. I
13 would, however, like to clarify this issue about
14 the press conference. And offer a couple of
15 solutions. I did give a press conference during
16 the last trial session and I did make reference
17 to Mr. Barhoumi's defective hand. I just say
18 that and I say it—perhaps I said it in artfully.
19 There are news articles from that press
20 conference saying that I said, "He had a birth
21 defect." There are news articles saying that I
22 wouldn't comment on it. Whatever I said it was
23 obviously in artfully said, that being said, I've

1 talked to the Appointing Authorities Public
2 Affairs Officer and she's told me that there is a
3 tape of some sort of recording of that press
4 conference in D.C. If you think that it is an
5 important issue that needs to be resolve, we can
6 request that tape and try to get it down here as
7 soon as possible, if it's not, if it's not that
8 important to you, and I would just prefer to
9 "drive on."

10
11 **Presiding Officer:** Well, I will tell you that that
12 particular issue is not outcome determinative of
13 the motion that you presented. And I feel
14 entirely comfortable that I can resolve this
15 matter attributing to both of the witnesses that
16 they were telling the truth on all matters
17 related to this motion.

18
19 **DC:** Okay, sir.

20
21 **Presiding Officer:** With that, do you wish to be heard on
22 the motion?
23

1 **DC:** No, sir. Do I wish to argue?

2

3 **Presiding Officer:** Yes.

4

5 **DC:** I do, sir.

6

7 **Presiding Officer:** Very well. You may proceed.

8

9 **DC:** Sir, this motion is not about or not completely
10 about push button facets and push button toilets
11 and the temperature at the various camps. What
12 this is about is pretrial punishment, punishment
13 for no reason. And if you look at Colonel B's
14 testimony, he gave primarily two reasons for the
15 move of the pre-commissioned detainees from Camp
16 4 to Camp 5.

17

18 The first is that they are experiencing some
19 downsizing, some consolidation, and the movement
20 of Mr. Barhoumi from Camp 4 to Camp 5 would allow
21 openings for other people to move to Camp 4. But
22 he didn't have an explanation for why it had to
23 be Mr. Barhoumi. Only that he was pre-

1 commissioned and he went then to the second prong
2 or his second reason for moving the detainees.
3 Colonel B cites to several Army regulations and
4 Geneva Convention III. And on this Geneva
5 Convention point, I would like to point out that
6 the government tends to invoke the Geneva
7 Conventions and Army regulations and the *Manual*
8 *for Courts-Martial* when it suits them and prefers
9 to disregard them when it doesn't suit them.

10
11 If we are going to follow Geneva Convention III,
12 the defense would welcome that. Let's follow it
13 and if we are going to follow it, let's follow it
14 to the letter of the law. And let's give Mr.
15 Barhoumi a court-martial and let's consider him a
16 prisoner of war and let's give him all the rights
17 to an appeal, as any service member would have,
18 as is required by the Geneva Conventions. Let's
19 provide him with the required number of franks
20 every day. Let's provide every detainee with two
21 hours of recreation, as is required by Geneva
22 Convention III.

1 But they often tend to invoke the Conventions
2 when they believe it suits their purposes.
3 However, Colonel B's invocation of Geneva
4 Convention III and AR 190-8 and AR 190-8 at
5 paragraph 3-7(h) essentially is a verbatim
6 transcription of Article 103 of Geneva Convention
7 III. And what it says there is that "a detainee
8 will not be confined while awaiting trial unless
9 a member of the U.S. Armed Forces would be so
10 confined if accused of a similar offense."

11
12 If that is what he is invoking, if that's the
13 provision that he is invoking, and it was clear
14 to me that that is the provision he was talking
15 about, then let's look at would a U.S. service
16 member be confined for committing a similar
17 offense? Pretrial confinement of U.S. service
18 members is governed by Rules for Court-Martial
19 305. And the government has to meet several
20 prongs in order to confine somebody under
21 pretrial confinement: "First, that an offense
22 tried by court-martial has been committed has
23 been committed, that the prisoner committed it,

1 and that confinement is necessary because it is
2 foreseeable 1) that the prisoner won't appear at
3 trial or 2) that the prisoner will engage in
4 serious criminal misconduct.

5
6 And the last prong is that less severe forms of
7 restraint are inadequate. Applying that law to
8 the facts in this case, Mr. Barhoumi, in order to
9 place him in pretrial confinement, would have to
10 either be a flight risk or likely to engage in
11 serious criminal misconduct.

12
13 He is apparently not likely to engage in serious
14 criminal misconduct because he, even by Colonel B
15 own assertion, was in a highly compliant status;
16 he's never had any problems with him. Mr.
17 Barhoumi has never made any threats towards
18 anyone. He's never tried to escape. And so it
19 doesn't appear that there's any assertion that
20 he's likely to engage in serious criminal
21 misconduct.

1 Whether or not he's a flight risk, apparently,
2 Camp 4 was sufficient to keep him from fleeing.
3 He's been at Guantanamo for almost 4 years. He
4 was in Camp 4 for about a year and he was never--
5 he never tried nor was he ever able to escape,
6 and that's the prong that the government can't
7 meet here. Camp 4 is a less severe form of
8 restraint. It's adequate. It achieves that
9 government's goals. It ensures the detainee's
10 presence at trial. It ensures that he's not
11 going to engage in serious criminal misconduct,
12 so if they want to invoke Geneva Conventions and
13 they want to follow Army regulations, fine. But
14 if that's what they're going to do, they're not
15 doing that in this situation.

16
17 In U.S. v. Crawford, cited in the defense brief,
18 the Court of Appeals for the Armed Forces says,
19 "We do not wish to convey the impression that we
20 condone arbitrary policies imposing maximum
21 custody upon pretrial prisoners. We will
22 scrutinize closely any claim that maximum custody
23 was imposed solely because of the charges rather

1 than as a result of a reasonable evaluation of
2 all the facts and circumstances of a case."

3
4 In this case, according to Colonel B., there was
5 no reasonable evaluation of all the facts and
6 circumstances. It was a blanket decision made to
7 move all Pre-Commission detainees into maximum
8 custody. It was an arbitrary decision and
9 there's no basis for his assertions. There's no
10 basis to believe that Mr. Barhoumi is in any
11 danger, that he's a danger to others, that he's a
12 flight risk, or that he's going to engage in any-
13 any kind of serious criminal misconduct.

14
15 It was made--the decision to move him to maximum
16 custody was made solely because of the charges
17 and for no other reason. Because the
18 consolidation reason doesn't--doesn't hold up.
19 Any detainee could have been moved out of Camp 4
20 to make room for others if that's what they
21 wanted to do.

1 Mr. Barhoumi has suffered punishment as a result
2 of the move to Camp 5. You heard him say that
3 everyone in the camp knows that Camp 5 is for
4 punishment. According to Colonel B., there were
5 only five highly compliant detainees in Camp 5
6 and they were there for intelligence value.

7
8 Camp 4 is where the highly compliant detainees
9 are or they're in some other camp waiting for
10 their turn to get into Camp 4. Mr. Barhoumi's
11 already waited his turn. He's already made it to
12 Camp 4. He's done everything that was asked of
13 him. He participated in this Commission
14 proceedings and--and everything was progressing
15 along in an acceptable manner.

16
17 The government moves him to Camp 5 and all of a
18 sudden, things are made much more difficult for
19 his--for his attorneys--or for his attorney. You
20 heard Mr. Barhoumi say that we've spent the last
21 2 days, me trying to convince him, let's move
22 forward, let's not boycott, let's you know let's
23 litigate this motion to try to get you back to

1 Camp 4. It wasn't spent talking about the case,
2 talking about which witnesses would be good to
3 call, talking about how best to counteract the
4 government's evidence that they have against him.
5 It was spent trying to convince him that I'm
6 trying to act in his best interest and trying--
7 trying to get moving and--and both days have been
8 spent trying to get him to even bring this motion
9 before this Commission.

10
11 Whether or not the government specifically
12 intended it, it's happened. Mr. Barhoumi feels
13 that it's punishment and it has had an impact on
14 our ability to discuss and come up and for him to
15 participate in his defense.

16
17 Sir, the defense respectfully asks that you order
18 the government to move Mr. Barhoumi back to Camp
19 4. Now, whether or not you have that authority
20 is of some question, but as the government
21 concedes in their--in their brief, you do have
22 the power to abate these proceedings until he is
23 moved back to Camp 4. If you don't believe that

1 you have the authority to order it, then we would
2 ask that you abate these proceedings until Mr.
3 Barhoumi is moved back to Camp 4.

4
5 Thank you.

6
7 **Presiding Officer:** Thank you. Does the prosecution wish
8 to be heard?

9
10 **APROS:** Yes, sir.

11
12 **Presiding Officer:** You may proceed.

13
14 **APROS:** Thank you, sir.

15
16 The defense has raised many allegations in its
17 brief none of which are backed by any credible
18 evidence. It's clear, after the testimony of
19 Colonel B. today, that the accused was not moved
20 for any retaliation for his cooperation in the
21 Commission's process. He was not moved in an
22 attempt to intentionally impact the accused's
23 attorney/client relationship. He was moved for a

1 security concern that the JTF, GTMO had based on
2 his change of status to a pre-trial detainee.

3
4 And while there is no doubt that the accused may
5 have enjoyed life more in Camp 4 than Camp 5, the
6 important thing for the Presiding Officer to
7 consider here is, is that change from Camp 4 to
8 Camp 5 impacting his right to a full and fair
9 trial? Because, sir, that--that is your mandate,
10 to ensure that he has a full and fair trial and
11 there's nothing in the record that indicates in
12 anyway that the accused will not enjoy a full and
13 fair trial now that he is housed at Camp 5.

14
15 The accused testified and the very fact that
16 we're here and that we've litigated this issue
17 and that it was obviously very well prepared by
18 the defense and that the accused was able to
19 testify, shows that the attorney/client
20 relationship is not broken. There is no impact
21 that would prohibit the accused from receiving a
22 full and fair trial. This very fact that we're
23 here is the very best evidence of that, sir.

1
2 The defense cites to U.S. verse Crawford and U.S.
3 verse Crawford is clear for the proposition that
4 custody is not arbitrary when it relates to a
5 security need. And Colonel B. clearly testified
6 that it was the security that was the--his
7 primary concern, and he articulated his reasons
8 why and why there's a general concern when
9 someone's about to go to trial that either he may
10 be a risk to himself or he may have a risk to his
11 security from others.

12
13 And while the accused--while there may not be any
14 very specific threat against the accused, the
15 problem in these situations is you don't know
16 until it's too late. You don't know that there's
17 a threat against the accused in Camp 4 until he's
18 laying there in his own pool of blood, and the
19 JTF is charged with detaining these individuals
20 humanely and they're charged with ensuring their
21 safety and security. And quite frankly, sir,
22 that's the JTF's call. That's Colonel B.'s job,
23 and he needs to be given great difference in his

1 decision on where to move these detainees in
2 order to maximize their security. That's what he
3 did when he chose to move everybody from--any--
4 everybody that is in a Pre-Commission status to
5 Camp 5.

6
7 So through the testimony of Colonel B., through
8 the testimony of the accused today, the accused's
9 ability to help in his own defense has not been
10 impacted. Even by his own admission, he's able
11 to get everything he needs. He has all of his
12 materials. He's able to meet with his defense
13 counsel in the same exact circumstance as he was
14 able to meet with him prior to his move.

15
16 The defense has the burden here to show that his-
17 -that his right to a full and fair trial, which
18 is his right and his only right we're talking
19 about today, has been impacted in some way, and
20 the evidence simply shows that it hasn't. He's
21 being detained humanely and the government's
22 position is that the defense motion should be
23 denied, sir.

1

2 **Presiding Officer:** Thank you. Captain Faulkner, you've
3 got the burden of proof on this. Would you like
4 to have the closing comment?

5

6 **DC:** I would, sir, if I could just address a couple of
7 things that the government said.

8

9 In speaking about a full and fair trial, the
10 government noted that this was a well-prepared
11 motion and that the--Mr. Barhoumi was able to
12 participate. Well, this is a legal motion raised
13 mostly on research done on my part, work down
14 primarily on my part, and that--that wasn't
15 impacted, but the fact that it took me until this
16 morning to even be able to discuss with Mr.
17 Barhoumi his testimony today and today wasn't
18 relatively difficult testimony, it didn't take a
19 lot of preparation to get him ready to testify,
20 but if you extrapolate that down the road where
21 specific factual issues are going to come up and
22 I'm going to need more information from Mr.
23 Barhoumi, if all of my time is spent explaining

1 to him, trying to get him to participate, trying
2 to get him to cooperate, trying to explain to him
3 that this movement to Camp 5 is not punishment,
4 then the ability for a full and fair trial will
5 be impacted.

6
7 The government pointed out that there's a
8 general--that Colonel B. noted a general concern
9 when people go to trial. But that's not what
10 Crawford says. Crawford says, "a determination
11 to place someone in maximum custody must be made
12 on a reasonable evaluation of all the facts and
13 circumstances in each case." And Colonel B.
14 himself said, he doesn't care if it's a hundred,
15 200, 300, or 490 personnel going before
16 Commission, they're all going to maximum custody.
17 He's not looking at each individual case as he's
18 charged to do under Crawford. It's his opinion,
19 his arbitrary opinion that people facing
20 Commission ought to be in maximum custody solely
21 because they're facing Commission and not based
22 on any reasonable evaluation of the facts and
23 circumstances of each case.

1
2 The government pointed out, it was simply the
3 change of status that precipitated this move to
4 Camp 5. It wasn't anything that Mr. Barhoumi
5 did. Presumably, if there was no Commission, Mr.
6 Barhoumi would still be in Camp 4. It was an
7 arbitrary decision and it was not based on any
8 evaluation of the facts and circumstances of Mr.
9 Barhoumi's case; and, therefore, we would request
10 that you grant the defense motion.
11

12 **Presiding Officer:** Thank you. Before I recess to consider
13 this motion, I would like to thank counsel and
14 complement you on the motions, the timeliness of
15 them and their thoroughness of them as well as
16 your preparation and presentation this morning
17 and this afternoon and your arguments,
18 particularly yours Captain Faulkner on behalf of
19 your client.
20

21 It's 1525, that's 3:25 p.m. I understand this is
22 a matter of some urgency, so I don't wish to
23 delay making a ruling so that your client will

1 know where he stands; however, I do need some
2 time to consider these issues. My intention is
3 to retire to chambers for some period of time and
4 issue a memorandum ruling today. I think it
5 would be useful to place that on the record, so
6 my expectation is that I could be ready to do
7 that in probably slightly over an hour, so I
8 would ask you to stand by for us to come back on
9 the record so that we can take care of that
10 before we recess for the day.

11
12 Does either side anticipate any other business
13 before the Commission this afternoon?
14

15 **APROS:** The government does not, sir.

16
17 **DC:** No, sir.
18

19 **Presiding Officer:** Very well. The commission is in
20 recess.
21

22 *The Commission Hearing recessed at 1523, 26 April 2006.*
23

1 *The Commission Hearing was called to order at 1640, 26*
2 *April 2006.*

3

4 **Presiding Officer:** This Commission is called to order.

5

6 **APROS:** All parties present when the Commission recessed
7 are again present.

8

9 **Presiding Officer:** In the interests of addressing this
10 urgent matter, I am entering this summary ruling
11 and I will enter my complete findings into the
12 record at a later date.

13

14 Among those findings will be the following, which
15 I find by a preponderance of the evidence:

16

17 The transfer of the accused from Camp 4 to Camp 5
18 was one transfer among others included in the
19 framework of a large reorganization and
20 assignment plan.

21

22 The plan which resulted in the transfer of the
23 accused was among several options staffed by the

1 directorates within the Joint Task Force and
2 briefed to the Commanding General.

3
4 The plan, ultimately approved by the Commanding
5 General was recommended by the Commander Joint
6 Detention Group. Several goals were the object
7 of the reorganization plans, including the
8 closing of Camps 2 and 3, the co-location of
9 detainees pending trial by Military Commission,
10 and the maximization of staff and resources,
11 including the 175 beds in Camp 4, which were
12 used, in part, as an incentive to detainees who
13 were highly compliant in obeying camp rules.

14
15 As part of the approved plan the Joint Detention
16 Group Commander recommended co-locating the pre-
17 commission detainees in Camp 5. This was
18 recommended in order to bring camp operations
19 into line with what the Commander viewed as
20 guidance from Army regulations as informed by the
21 principals articulated in the III Geneva
22 Convention. Neither the Army regulations nor the
23 III Geneva Convention are directly applicable to

1 the unique circumstances of the Guantanamo Bay
2 detainees, but the Commander referred to them as
3 the best available guidance in structuring the
4 detention camps.

5
6 The Joint Detention Group Commander's specific
7 concerns about the pre-commission detainees were
8 their safety and their security.

9
10 In his experience of 24 years as a military
11 policeman, the Commander believed that the pre-
12 commission detainees were in a vulnerable
13 analogous to more traditional pretrial detainees
14 pending criminal trials.

15
16 These detainees, in his judgment, require a
17 maximum-security facility to ensure their safety
18 and security while going through the trial
19 process.

20
21 The Joint Detention Group Commander testified
22 that all pre-commission detainees, except two,
23 for reasons not germane to this case, are now co-

1 located in Camp 5, and all future detainees
2 charged and referred to trial before a Military
3 Commission will be co-located in Camp 5 for the
4 reasons stated.

5
6 The co-location of pre-commission detainees also
7 facilitated the reassignment of other detainees
8 to Camp 4, which were needed to accomplish camp
9 consolidation.

10
11 Briefly stated, Camp 4 is a medium-security
12 facility while Camp 5 is a maximum-security
13 facility. While there are certainly qualitative
14 differences in the standard of living between the
15 two camps, as well as security differences, there
16 is no evidence that the transfer of this accused
17 from Camp 4 to Camp 5 was done with an intention
18 to punish him, or to interfere with the
19 meaningful exercise of his right to counsel.

20
21 With respect to access to counsel, Camps 4 and 5
22 provide the same level of access and require the
23 same procedures to meet with counsel. A request

1 is processed, and when approved, counsel are
2 permitted to meet with their client at Camp Echo,
3 which provides an environment conducive to such
4 meetings.

5
6 Thus, there was no change in the accused's actual
7 access to counsel as a result of his transfer
8 from Camp 4 to Camp 5.

9
10 In transferring the accused from Camp 4 to Camp
11 5, there was no intent on the part of detention
12 facility officials to punish the accused or to
13 interfere with his meaningful exercise of his
14 right to counsel.

15
16 Fairness dictates that this Commission determine
17 whether the transfer of the accused from Camp 4
18 to Camp 5, with its attendant change and
19 circumstances, was imposed for the purpose of
20 punishment or to interfere with the accused's
21 meaningful exercise of his right to counsel or
22 whether the transfer is merely an incident of
23 some other legitimate governmental purpose.

1
2 Absent a showing of an intent on the part of
3 detention officials to punish or interfere with
4 the accused's access to counsel, that
5 determination depends on whether the transfer and
6 the change in conditions of his detention is
7 reasonably related to a legitimate governmental
8 objective. Ensuring security and order at a
9 confinement facility is a permissible nonpunitive
10 governmental objective.
11

12 In determining whether a transfer and change in
13 living conditions are reasonably related to a
14 legitimate governmental interest, United States
15 courts acknowledge that maintaining security and
16 order and operating a detention facility in an
17 orderly fashion are matters peculiarly within the
18 providence and professional expertise of
19 corrections officials.
20

21 In the absence of substantial evidence in the
22 record to indicate that the officials have
23 exaggerated their response to these

1 considerations, court should ordinarily defer to
2 their expert judgment in such matters, even when
3 applying United States Constitutional standards.
4

5 In deed, U.S. courts resolving issues where the
6 United States Constitution is fully applicable
7 accord prison administrators wide range and
8 deference in the adoption and execution of
9 policies and practices, that in their judgment,
10 are needed to preserve internal order and
11 discipline and to maintain institutional
12 security.
13

14 Since there was no evidence that the transfer and
15 its related change in living conditions was
16 employed by JTF officials with an intent to
17 punish this detainee or to interfere with his
18 meaningful exercise of the right to counsel, the
19 transfer and the related changes in conditions
20 were responses by officials to legitimate and
21 clearly articulated security concerns.
22

1 Having been fully staffed and approved by those
2 officials charged with the responsibility for
3 administering the camps with clear goals to which
4 the transfers and related security changes were
5 rationally related, the decision to transfer pre-
6 commission detainees, including this accused, was
7 not arbitrary.

8
9 The fact that the new security requirements
10 interfere with the accused's understandable
11 desire to live as comfortably as possible and
12 with as little restraint as possible during
13 detention does not convert the conditions or the
14 restrictions of detention into a punishment, even
15 though he actually feels that he has been
16 punished. Therefore, the defense motion for
17 relief is denied.

18
19 Ordinarily we would next move to consider a trial
20 order and matters to be resolved at the next
21 session of the Commission but in light of Mr.
22 Foreman's absence, counsel, my preference will be

1 to try to engage him in that and do that in
2 writing following this session.
3
4 What is the prosecution's positions on that?
5
6 **APROS:** The prosecution agrees, sir.
7
8 **Presiding Officer:** Captain Faulkner?
9
10 **DC:** That is fine with us, sir.
11
12 **Presiding Officer:** Very well. Is there any other business
13 to be attended to today?
14
15 **APROS:** Not from the government, sir.
16
17 **DC:** No, sir.
18
19 **Presiding Officer:** Very well. This Commission is in
20 recess.
21
22 *The Commission Hearing recessed at 1650, 26 April 2006.*

UNITED STATES OF AMERICA

v.

ABDUL ZAHIR
a/k/a Abdul Bari

D 1 (Zahir)

PROSECUTION RESPONSE

To Defense Motion for Appropriate Relief

Transfer Accused to Camp IV

10 May 2006

1. Timeliness. This response is filed within the timeline established by the Presiding Officer (PO).
2. Relief. The Defense motion should be denied as a matter of law.
 - a. As a matter of law, the facts set forth by the Defense do not require action by the PO. The PO should find in favor of the Prosecution on the basis of the filings alone.
 - b. Alternatively, if the PO directs a hearing for this motion, the PO should deny the Defense motion based upon the facts supplied in the filings, without requiring further production of witnesses or evidence.
 - c. Alternatively, if the PO grants a full hearing in this matter, the PO should deny the Defense motion.
3. Overview.
 - a. Military Commissions, like all other military tribunals, are courts of limited jurisdiction. The authority of the Military Commission is defined by the authority delegated to the Commissions by the President through the President's Military Order (PMO) of 13 November 2001, Military Commission Order #1 (MCO #1) of the Secretary of Defense, and long-standing practice. In broad terms, the authority of the Military Commission, and the Presiding Officer, extends only to those measures necessary and appropriate "to ensure that [the Accused] receives a full and fair trial before a military commission," paragraph 1, MCO #1, subject to lawful limitations. The authority of the Military Commission, and the Presiding Officer, does not extend to "all writs."

b. Contrary to Defense assertions, Article 13 of the Uniform Code of Military Justice has no bearing on the motion. The accused's detention in Camp V with other detainees charged before Military Commissions is not punishment.

c. The accused, together with his fellow detainees, is held at Guantanamo Bay, Cuba under the authority of the PMO. The President set out the standard for conditions of confinement in the PMO when he directed that detainees be treated humanely.

d. The Commander, Joint Task Force - Guantanamo Bay, Cuba (JTF-GTMO), directed that the detainees charged before Military Commissions, including the accused, be moved into Camp V to segregate the "pretrial detainees" from the general population of the camps as part of a re-organization and consolidation of all of the detention facilities to improve operational efficiency, general conditions of confinement, and safety, consistent with long-established detention doctrine. The movement of the Accused from Camp IV to Camp V does not impair the accused's entitlement to "a full and fair trial before a military commission."

e. The decision of the JTF-GTMO Commander to segregate and consolidate detainees charged before Military Commissions, including the accused, was an operational decision. It was grounded in sound detention practices, a wealth of correctional experience and intimate knowledge of the ever-changing circumstances in the facilities for which he is responsible. The decision falls within the extraordinarily broad discretion accorded to a commander in the conduct of military operations. It also falls within the broad discretion accorded those responsible for the management of correctional facilities. The decision should not be disturbed by the PO absent a compelling interest that clearly outweighs the extraordinary deference courts are bound to afford operational decisions of military commanders in the field, and to members of the executive responsible for operating detention facilities.

f. The detention of the accused in Camp V has not compromised the accused's entitlement to "a full and fair trial before a military commission" under paragraph 1 of MCO #1. The accused's conditions of confinement in Camp V are humane. As a matter of law, the PO should deny the Defense motion.

4. Facts.

a. On 13 November 2001, the President, under the authority vested in him as Commander in Chief of the Armed Forces of the United States, ordered the detention of "certain non-citizens in the war against terrorism." PMO #1. The accused, a citizen of Afghanistan, was detained as an unlawful enemy combatant in Afghanistan under the law of war. The accused is not a United States citizen. The accused is presently held at U.S. Naval Station, Guantanamo Bay, Cuba (GTMO).

- b. On 3 January 2006, while the accused was housed in Camp IV, he refused his evening meal, demanding to be transferred to Camp V. The accused continued to periodically refuse meals after that date.
- c. Shortly after 29 March 2006, the accused was moved from Camp IV to Camp V.
- d. On 3 April 2006, the Defense Counsel spoke with the Prosecutor in this case. Defense Counsel requested that the Prosecutor endorse Defense Counsel's request through the Joint Task Force Guantanamo Bay (JTF-GTMO) Staff Judge Advocate (SJA) to the Joint Detention Operations Group (JDOG), JTF-GTMO that the accused be moved back to Camp IV. The Defense Counsel characterized his request, made on behalf of the accused, as a gesture to enhance the comfort of the accused. While warning the Defense Counsel that JTF-GTMO, not the Office of the Chief Prosecutor, determines the placement of detainees, the Prosecutor agreed to endorse the Defense Counsel's request. The Prosecutor did not seek or obtain the concurrence of the JTF-GTMO SJA for his endorsement of the Defense Counsel's request.
- e. On 6 April 2006, COL Michael I. Bumgarner, Commander, JDOG, JTF-GTMO, prepared a sworn affidavit. The affidavit was prepared in response to a motion by the Defense in the case of *US v Khadr* that is virtually identical to the motion in the present case. The affidavit addresses the operational decision by the Commander, Joint Task Force Guantanamo (JTF-GTMO) to move the detainees charged before Military Commissions with offenses under the law of war out of the general population of unlawful enemy combatants. The affidavit describes the reasons underlying the decision, making reference to standards developed by the American Correctional Association, and set out in Army Regulations (AR) 190-47 and 190-8. The affidavit makes clear that the operational decision by the commander was based upon sound detention policy.
- f. On 10 April 2006, the JTF-GTMO SJA notified the Prosecutor that the Defense Counsel's request to move the accused back to Camp V had been refused by the JDOG Commander. The Prosecutor then communicated this decision to Defense Counsel.
- g. On 26 April 2006, COL Bumgarner testified under oath in the case of *U.S. v. Barhoumi*. The testimony lasted over 2 ½ hours, occupying 112 pages in the draft transcript of that session. The requested witness explained why the JTF-GTMO Commander decided to move detainees charged before Military Commissions with offenses under the law of war out of the general population of unlawful enemy combatants. His testimony describes the physical facility of Camp V; the detention regimen in Camp V; the population, apart from the detainees charged before Military Commissions, housed in Camp V; the physical facility of Camp IV; the detention regimen in Camp IV; the population who were housed in Camp IV; the various bases for the classification of detainees; the scheduled closure of various facilities; the projected completion of Camp VI; the physical facility of Camp VI; leadership discretion and professional judgment in the determination of the appropriate placement of detainees

within the facilities; the interplay of detainees' physical security and intelligence concerns; detainee behaviors; the complexities of scheduling detainee activities; the policy basis of the decision by the Commander, JTF-GTMO to move detainees charged before Military Commissions out of the general population of unlawful combatants; the study and staffing of that decision; the use of PowerPoint to summarize that staffing for the Commander, JTF-GTMO; the content of that PowerPoint briefing, the "main focus of [which] was not about the Commissions"; reductions in the personnel strength of the guard force; the ability to safely manage Camp V with fewer personnel than the older camps, including Camp IV; the application of the Third Geneva Convention, AR 190-47 and AR 190-8; the requirement in AR 190-47 to separate "pretrial detainees" from the general population of a detention facility; the authority in AR 190-8 and the Third Geneva Convention to confine detainees subject to trial separately from those who are not subject to trial; the distinction between enemy combatants and pretrial detainees; that two detainees charged before Military Commissions are not presently housed in the same wing of Camp V; that one of those detainees was not then held with the other detainees in the same wing of Camp V because the command believed that an order from a Federal District Court arguably barred his transfer; that another is not housed in Camp V for classified operational reasons that outweigh the general policy considerations; the risks associated with the mixing of detainees charged before Military Commissions and those who are not; that the movement of the detainees charged before Military Commissions was not motivated by an intent to inflict punishment or retaliation on those detainees; how detainees address concerns to the guard force and JTF-GTMO leadership; how those concerns are documented; how the guard force and leadership respond to those concerns; how the witness responded to a concern expressed by the accused in *Barhoumi*; details of prayer call; details of recreation; the recreational rotation; specific physical security concerns among and between those charged before Military Commissions; the mechanics of Defense Counsel visitation to a detainee housed at Camp V; that the Camp V process is identical to that employed in a Defense Counsel visitation to a detainee housed at Camp IV; that detainees have immediate access to their legal papers in their cells at Camp V; that security for a detainees' legal papers is greater at Camp V than at Camp IV because other detainees are unable to access the papers; the movement of detainees charged before a Military Commissions was not intended to interfere with the attorney client relationship; that the location of a detainee in the facilities has no impact on the ability of a counsel to visit with an accused; detainee methods for moving information among the various camps, including demands to be moved from camp to camp on pretext; the practical differences between Camp IV and V, from the point of view of a detainee; detainee communications with the International Committee of the Red Cross, habeas counsel and Commission counsel; that custodial matters are distinct from judicial matters; the lack of a defense counsel role in custodial decisions; and a variety of other issues.

h. In paragraph 4u of the subject motion, Defense states as fact that "[o]n review of said transcript, several issues remain unanswered which thus prompted this Motion."

Defense does not identify the unanswered issues. This statement is argument rather than fact.

i. Now housed in the Camp V wing designated for detainees charged with offenses before Military Commissions, the accused has assumed the role of the wing Imam. The accused customarily makes five daily calls to prayer to the Muslim detainees in the wing and leads their shared worship.

j. On 30 April and 1 May 2006, while the accused was housed in Camp V, he demanded transfer back to Camp IV, informing the guard force that he refused various meals for that reason. The accused continues to periodically refuse meals.

k. For the purposes of this motion, the Prosecution disagrees with the matters averred by the Defense Counsel in paragraph b, j, l, o, p, t and u.

5. Legal Authority.

- a. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)
- b. *Clinton v. Goldsmith*, 526 U.S. 529 (1999)
- c. *Dalton v. Specter*, 511 U.S. 462 (1995)
- d. *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990)
- e. *Bell v. Wolfish*, 441 U.S. 520 (1979)
- f. *Parisi v. Davidson*, 405 U.S. 34 (1972)
- g. *In re Yamashita*, 327 U.S. 1 (1946)
- h. *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)
- i. *The Adula*, 176 U.S. 361 (1900)
- j. *Smith v. Whitney*, 16 U.S. 167 (1886)
- k. *Beard v. Burts*, 95 U.S. 434 (1877)
- l. The President's Military Order of 13 Nov 2001
- m. Military Commission Order #1 (31 Aug 2005)
- n. Military Commission Instruction #8 (16 Sep 2005)

o. Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1 Oct 1997) (86 pages), online at http://www.army.mil/usapa/epubs/pdf/r190_8.pdf.

p. Army Regulation 190-47, The Army Corrections System (13 Dec 2003) (104 pages), online at http://www.army.mil/usapa/epubs/pdf/r190_47.pdf.

q. Military Law and Precedents, Col. William Winthrop (2^d Ed., War Dept. Reprint, 1920).

6. Discussion

a. Military Commissions, like all other military tribunals, are courts of limited jurisdiction. Military Law and Precedents, Col. William Winthrop, pp 831-46 (2d Ed. 1920); *Clinton v. Goldsmith*, 526 U.S. 529 (1999). The authority of the Military Commission is defined by the authority delegated to the Commissions by the President through the President's Military Order (PMO) of 13 November 2001, Military Commission Order #1 (MCO #1) of the Secretary of Defense, and long-standing practice. *Smith v. Whitney*, 16 U.S. 167 (1886). In broad terms, the authority of the Military Commission, and the Presiding Officer, extends to measures necessary and appropriate "to ensure that [the Accused] receives a full and fair trial before a military commission," paragraph 1, MCO #1, subject to lawful limitations. See *Parisi v. Davidson*, 405 U.S. 34 (1972). The authority of the Military Commission, and the Presiding Officer, does not extend to "all writs." See *Goldsmith* at 536-37.

b. The accused, together with his fellow detainees, is held at Guantanamo Bay, Cuba under the authority of the Law of War. The President set out the standard for the detainees' conditions of confinement in the PMO when he directed that detainees be treated humanely. The conditions of the Accused's confinement in Camp V, a facility that is nearly identical to a Federal correctional facility housing prisoners in the United States, are definitionally humane.

c. The PO may not take the action requested by Defense Counsel without first finding that either the movement of the accused from Camp IV to Camp V has impaired the accused's entitlement to "a full and fair trial before a military commission," or, alternatively, that the accused's conditions of confinement in Camp V are not humane. If the PO were to find either of those circumstances, he would then need to turn to the question of whether the Military Commission is vested with the authority to grant the requested relief before considering whether to grant the requested relief.

d. The Commander, JTF-GTMO, directed that the detainees charged before Military Commissions, including the accused, be moved into Camp V to segregate the "pretrial detainees" from the general population of the camps, consistent with long-established detention doctrine as reflected in Army Regulation (AR) 190-47, The Army Corrections

System, AR 190-8¹, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, and American Correctional Association standards. Each of these doctrinal references mandate separation of various categories of detainees. Segregating the group of charged detainees from the uncharged detainees increases the safety and security of the facilities for all detainees, as well as the members of the guard force. The changes in the camps were also made as a result of a re-organization and consolidation of all of the detention facilities to improve operational efficiency, general conditions of confinement, and safety. The movement of the Accused from Camp IV to Camp V does not impair the accused's entitlement to "a full and fair trial before a military commission."

e. The accused's right to a full and fair trial has not been impacted by his move from Camp IV to Camp V, nor has there been any interference with the accused's entitlement to counsel. Defense Counsel has not alleged that his access to his client has been adversely affected in any way. The accused meets with the Defense Counsel under the same conditions that existed prior to his move to Camp V. The accused can fully participate in his defense. The accused's general unhappiness with his present conditions of detention does not demonstrate that the accused's entitlement to a full and fair trial under the PMO is adversely effected, or that that the government has interfered with the accused's entitlement to counsel.

(1) Domestic pretrial detention jurisprudence, where a defendant enjoys the full panoply of Constitutional protections, recognizes that a defendant's preference and comfort are irrelevant to a challenge to the conditions of pretrial detention is legally sound.

Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention. Traditionally, this has meant confinement in a facility which, no matter how modern or how antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial. Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into "punishment."

Bell v. Wolfish, 441 U.S. 520, 537 (1979).

¹ Army Regulation 190-8 is a multi-service regulation governing all of the military branches.

(2) The accused, who is a citizen of Afghanistan, not of the United States, does not enjoy the full panoply of Constitutional protections. *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990). “Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens.” *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). As discussed above, the accused’s petition to the PO for relief from the conditions of his detention must be grounded in his entitlements to “a full and fair trial before a military commission” and “humane treatment,” not in the protections afforded to United States citizens under the Constitution.

f. Contrary to Defense assertions, Article 13, Uniform Code of Military Justice, has no bearing on the motion. Contrary to Defense assertions, the accused’s detention in Camp V with other detainees charged before Military Commissions is not punishment.

g. Camp V is a near exact replica of an American Correctional Institute-certified prison in Indiana. It is a general population facility where the detainees have their own cells. The detainees can communicate through the walls and are not discouraged from doing so. The accused is permitted to participate in daily communal prayer five times each day. The “bean hole” of the accused’s cell, a small, pass-through opening in the center of the cell door is opened by the guard force, as are the bean holes of his fellow detainees, to facilitate communal prayer. In fact, the accused customarily leads communal worship in his wing. Contrary to the Defense Counsel’s assertion, the accused is not being held *incommunicado*. The commission detainees are not segregated, held in isolation, or in solitary confinement. The detainee is allowed two hours of outdoor recreation a day, where he can communicate with up to five other detainees who are also recreating. While the accused may now take the view that Camp IV was more enjoyable, the accused has no entitlement to the conditions of detention he enjoyed in Camp IV prior to his move to Camp V. The conditions of the accused’s confinement in Camp V, a facility that is identical to a Federal correctional facility housing domestic prisoners in the United States, are definitionally humane.

h. The possibility that the accused may choose not to cooperate with the conduct of his trial before a Military Commission is irrelevant to the question of whether the PO can or should direct the Commander, JTF-GTMO to return the accused to Camp IV. Likewise, the possibility that the accused may choose not to cooperate with his Detailed Defense Counsel is also irrelevant. Such a decision by the accused would be a voluntary, conscious decision on his part. The accused is not entitled to dictate the conditions of his detention.

i. The decision of the Commander, JTF-GTMO, to direct the segregation and consolidation of detainees charged before Military Commissions, including the accused, is an operational decision. This decision falls within the broad discretion accorded to a commander in the conduct of military operations. *Beard v. Burts*, 95 U.S. 434 (1877); *The Adula*, 176 U.S. 361 (1900); *Dalton v. Specter*, 511 U.S. 462 (1995). This decision

should not be disturbed by the Military Commission absent a compelling interest that clearly outweighs the extraordinary deference courts are bound to afford to the operational decisions of military commanders in the field. See *Id*; *In re Yamashita*, 327 U.S. 1 (1946); *Holtzman v. Schlesinger*, 414 U.S. 1304 (1973) (Marshall, J. as Circuit Justice) (reversed, later reinstated at 414 U.S. 1316 and 1321, respectively); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

(1) The order of the Commander, JTF-GTMO to segregate and consolidate detainees charged before Military Commissions must be accorded deference not only because it is an operational decision of a military commander, but also because domestic pretrial detention jurisprudence recognizes that corrections officials are accorded broad judicial deference.

[T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters

Prison administrators are responsible for maintaining internal order and discipline [and] for securing their institutions against unauthorized access or escape The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons ... are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.

Wolfish at 547-48 (citations and quotations omitted). The decision of the JTF-GTMO Commander to direct the segregation and consolidation of detainees charged before Military Commissions was grounded in sound detention practices, a wealth of

correctional experience and intimate knowledge of the ever-changing circumstances in the facilities for which he is responsible. It should not be disturbed by the Military Commission.

(2) In *Wolfish*, the Supreme Court recognized that even under the full panoply of Constitutional protections enjoyed by U.S. citizens within the United States, practices such as double-bunking, “shake-downs,” and body-cavity searches are appropriate to the maintenance of security in a detention facility housing pretrial detainees. *Id* at 542-43, 555, and 558-59. As previously stated, the accused does not enjoy any Constitutional protections. *Verdugo-Urquidez* and *Curtiss-Wright Export*. The accused’s petition to the PO for relief from the conditions of his detention must be grounded in his entitlements to “a full and fair trial before a military commission” and “humane treatment.” Nonetheless, even if the PO were to assume the facts averred by Defense in their Motion for Appropriate Relief were true, the accused has not met his burden under any standard.

j. The accused is detained as an enemy combatant in accordance with the laws of war. The detention of the Accused in Camp V has not compromised the accused’s entitlement to “a full and fair trial before a military commission” under paragraph 1 of MCO #1. The accused’s conditions of confinement in Camp V are humane. The decision by the Commander, JTF-GTMO to segregate and consolidate of detainees charged before Military Commissions, including the accused, was an operational decision well within his broad discretion as a military commander. It also falls within the broad discretion accorded to those responsible for the management of correctional facilities. The accused has failed to meet his burden in this motion. As a matter of law, the PO should deny the Defense motion.

7. Burdens. The Defense has misstated the burden. The burden is on the moving party.

8. Oral Argument. If the Defense is granted oral argument, the Prosecution requests the opportunity to respond.

9. Witnesses and Evidence.

a. Witnesses. No witnesses are required to resolve this motion. However, should the PO determine that additional live testimony is needed, the Prosecution provides notice that it may call the following witness.

(1) COL Michael I. Bumgarner, Commander (CDR), JDOG, JTF-GTMO

b. Evidence.


(1) Affidavit of COL Michael I. Bumgarner, CDR, JDOG, JTF-GTMO dated 6 April 2006 (found in the defense filing and not re-filed here)

(2) Draft transcript of 26 April 2006 testimony of COL Michael I. Bumgarner, CDR, JDOG, JTF-GTMO in *U.S. v. Barhoumi* (attached)

10. Additional Information. None

11. Attachments. None

12. Submitted by:


Major, U.S. Army
Prosecutor
Office of Military Commissions
United States Department of Defense

ATTACHMENT TO REVIEW EXHIBIT 32

The Attachment to Review Exhibit 32 is the Draft transcript of the April 26, 2006 testimony of COL Michael I. Bumgarner, CDR, JDOG, JTF-GTMO in *United States v. Barhoumi*. Colonel Bumgarner's testimony is pages 44 to 155 of the Draft transcript.

The Attachment to Review Exhibit 31 is the entire Draft transcript of the April 26, 2006 session in *United States v. Barhoumi*. The transcript attached to Review Exhibit 31 is pages 20 to 217. As such, it includes the entire testimony of Colonel Bumgarner from the April 26, 2006 session.

Hodges, Keith

From: Hodges, Keith [REDACTED]
Sent: Thursday, May 11, 2006 6:28 PM
To: Bogar, Thomas, LTC, DoD OGC; Hodges, Keith
Cc: [REDACTED]

Subject: RE: Defense request for special relief IAW POM 4-3 for extension of Discovery Deadline - U.S. v. Abdul Zahir

The Presiding Officer has approved the defense's request.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[REDACTED]

From: Bogar, Thomas, LTC, DoD OGC [REDACTED]
Sent: Thursday, May 11, 2006 10:14 AM
To: 'Hodges, Keith'
Cc: [REDACTED]

Subject: RE: Defense request for special relief IAW POM 4-3 for extension of Discovery Deadline - U.S. v. Abdul Zahir

Mr. Hodges -

The Defense respectfully requests relief from the Discovery Order and asks that the current deadline of 17 May 2006 be extended to 31 July 2006, following our return from Afghanistan where at that time, the Defense will have a better understanding of what witnesses it intends to call. Furthermore, the Government owes discovery pursuant to the deadline of 17 May 2006 and will seek an additional extension through to 17 July 2006. The Defense will not object to said request. This request is made with the understanding that following approval, as soon as practicable, the Defense will provide responses to discovery.

The Defense also recognizes that discovery is a continuing obligation.

The Defense and Prosecution have discussed this issue, and the Government has no objections.

As such, the Defense respectfully requests an extension of the discovery deadline until 31 July 2006.

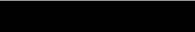
V/R

RE 33 (Zahir)
Page 1 of 2

TJB

*Thomas J. Bogar, LTC, JA
Office of Military Commissions
Office of the Chief Defense Counsel*



CONFIDENTIALITY NOTICE. The information contained in this e-mail and any accompanying attachments may constitute confidential, attorney-client information and work product which is legally privileged. This information is the property of the individual attorney and respective client. If you are not the intended recipient of this information, any disclosure, copying, distribution or the taking of any action in reliance on this information is strictly prohibited. If you received this e-mail in error, please notify us immediately by return e-mail or by calling 

ZAHIR
REVIEW EXHIBIT 34
PAGE 1

Review Exhibit (RE) 34, page 1 is curriculum vitae of Translators “B,” who was a translator involved in the hearing on May 17, 2006, in *United States v. Zahir*.

RE 34, page 1 consists of 1 page.

Translator B has requested, and the Presiding Officer has determined that **RE 34, page 1** not be released on the Department of Defense Public Affairs web site. In this instance Translator B’s right to personal privacy outweighs the public interest in this information.

RE 34, page 1 was released to the parties in the case in litigation, and will be included as part of the record of trial for consideration of reviewing authorities.

I certify that this is an accurate summary of **RE 34, page 1**.

//signed//

M. Harvey
Chief Clerk of Military Commissions

ZAHIR
REVIEW EXHIBIT 35
PAGE 1

Review Exhibit (RE) 35, page 1 is curriculum vitae of Translators “C,” who was a translator involved in the hearing on May 17, 2006, in *United States v. Zahir*.

RE 35, page 1 consists of 1 page.

Translator C has requested, and the Presiding Officer has determined that **RE 35, page 1** not be released on the Department of Defense Public Affairs web site. In this instance Translator C’s right to personal privacy outweighs the public interest in this information.

RE 35, page 1 was released to the parties in the case in litigation, and will be included as part of the record of trial for consideration of reviewing authorities.

I certify that this is an accurate summary of **RE 35, page 1**.

//signed//

M. Harvey
Chief Clerk of Military Commissions

ایالات متحده امریکا	(اتهامات:
علیه	(توطئه؛ کمک به دشمن؛
عبدالظاهر	(حمله به غیرنظامیان
مشهور به عبدالبری	(

صلاحیت

1. صلاحیت این کمیسیون یا محکمه نظامی بر اساس تصمیم مورخه 6 ماه جولای 2004 رئیس جمهور امریکا است که تعیین نموده که عبدالظاهر (مشهور به عبدالبری) مشمول دستور نظامی مورخه 13 ماه نومبر 2001 رئیس جمهور میباشد.
2. اتهامات وارده بر عبدالظاهر حائز شرایط برای طرح در محکمه نظامی میباشد.

اظهارات یا ادعاهای عمومی

3. القاعده در حدود سال 1989 توسط اسامه بن لادن و دیگران به مقصد مخالفت قهری و خشونت آمیز با برخی دولت ها و مقامات پایه گذاری شد.
4. اسامه بن لادن به حیث امیر (شاهزاده یا رهبر) القاعده خوانده میشود.
5. بر اساس گفته اسامه بن لادن و سایر رهبران القاعده، مقصد یا هدف القاعده حمایت از حملات قهری و خشونت آمیز علیه املاک و افراد (هم عسکری و هم ملکی) ایالات متحده و کشورهای دیگر به منظور از جمله مجبور ساختن ایالات متحده به خارج ساختن قوای خود از شبه جزیره عربستان و برای تلافی در مقابل حمایت ایالات متحده از اسرائیل میباشد.
6. عملیات و اقدامات القاعده بوسیله یک شورا مرکب از کمیته هائی بشمول زیر اداره میشود: کمیته سیاسی؛ کمیته نظامی؛ کمیته امنیتی؛ کمیته مالی؛ کمیته نشریات و رسانه ها؛ و کمیته دینی/قانونی.
7. بین سالهای 1989 و 2001 القاعده اقدام به ایجاد کمپ های تعلیمی، مسافر خانه ها یا گست هاوس ها، و عملیات تجاری در افغانستان، پاکستان، و سایر کشورها با هدف حمایت از حملات قهری و خشونت آمیز علیه املاک و افراد (هم عسکری و هم ملکی) ایالات متحده و کشورهای دیگر نمود.
8. در ماه اگست 1996 بن لادن یک اعلامیه علنی "جهاد علیه امریکائی ها" صادر نمود که در آن خواهان قتل افراد اردوی ایالات متحده موظف در شبه جزیره عربستان شد.
9. در ماه فبروری 1998 اسامه بن لادن، ایمان الظواهری و دیگران زیر لوای "جبهه اسلامی بین المللی برای حرب با یهودی ها و عیسویان" یک فتوای دینی صادر کرده و همه مسلمانانی را که دارای قابلیت جسمی بودند موظف نمودند که هر جا که امریکائی ها را یافتند - چه عسکری و چه ملکی - آنان را کشته و "پولشان را غارت کنند."

10. در حوالی تاریخ 29 ماه می 1998 اسامه بن لادن بیانییه ای تحت عنوان "بم ذروی اسلام" زیر لوای "جبهه اسلامی بین المللی برای حرب با یهودی ها و عیسویان" صادر نموده و در آن اظهار داشت که "وظیفه مسلمانان است که تا حد امکان قوه کلان آماده کنند تا دشمنان خدا را دچار دهشت کنند."

11. از سال 1989 تاکنون اعضاء القاعده و افراد وابسته به آن بطور شناخته شده و نا شناخته حملات متعدد دهشت افگنی انجام داده اند که این حملات بشمول زیر بوده ولی فقط به آنها محدود نمیشوند: حمله به سفارت خانه های امریکا در کینیا و تانزانیا در ماه اگست 1998؛ حمله به کشتی قوای بحری امریکا بنام کول در ماه اکتوبر 2000؛ و حملات 11 سپتمبر 2001 در خاک امریکا.

اتهام 1: توطئه

12. عبدالظاهر (مشهور به عبدالبری) در حدود سال های 1997 تا 2002 در افغانستان و سایر ممالک عالم و امدا به دسته ای از افراد ملحق شد که دارای یک مقصد مشترک جنائی بوده و با اسامه بن لادن، شیخ سعید المصری، عبدالهادی العراقی (مشهور به قطیبه)، محمد داود، عبدالوکیل السومالی، عبدالرئوف، محمد آغا، محمد رحیم، عبدالکبیر (مشهور به قاری بلال و ظلی گل)، عبدالحکیم، عبدالملک، عبدالقیوم و سعید احمد آغا، و سایر اعضاء و وابسته های شناخته شده و ناشناخته سازمان القاعده برای انجام جرم های زیر که مشمول محاکمه در محکمه یا کمیسیون نظامی است، توطئه و موافقه نمود: حمله به افراد غیر نظامی؛ حمله به اشیاء یا تاسیسات غیر نظامی؛ قتل بوسیله محارب غیر مجاز؛ نابودی اموال بوسیله محارب غیر مجاز؛ و دهشت افگنی که این اعمال در چوکات و در ارتباط با جنگ مسلحانه انجام گرفته اند.

13. در راه پیشبرد این سازمان و توطئه، عبدالظاهر و سایر اعضاء القاعده اعمال تعمدی زیر را مرتکب شدند: الف. در سال 1997، عبدالظاهر در طول یک سالی که در گست هاوس جنرال گدا در کابل کار میکرد ترجمان طالبان بود. و هر ماه بین 1000 تا 1500 روپیه پاکستانی در ازاء خدمتش به او معاش داده میشد. پسان، او به حیث ترجمان و حمل کننده پول برای عبدالهادی العراقی که یک قوماندان و حسابدار القاعده بود و امر مسافرخانه اعشاره در کارت پروان در ولایت کابل در افغانستان بود، انتخاب شد.

ب. عبدالظاهر به اعضاء سازمان القاعده معاش داده و خوراکه و اکمالات برای گست هاوس اعشاره خریداری میکرد. در ازاء این خدمت القاعده هر ماه 4000 روپیه پاکستانی بطور اضافه به او میداد.

پ. مدت کمی پس از 11 سپتمبر 2001 عبدالهادی العراقی به عبدالظاهر و سایر اعضاء عرب القاعده گفت که به افغانها در مورد مسئولیت سازمان القاعده در مورد واقعه حملات 11 سپتمبر 2001 دروغ بگویند.

ت. در اوائل سال 2002 عبدالظاهر از لوگر در افغانستان به پیشاور در پاکستان سفر کرده و به عبدالهادی العراقی و دیگران ملحق شد تا برای حملات با مواد منفجره علیه قوای امریکا و غیرنظامیان خارجی در ولایات زورمت و پکتیا در افغانستان، پلان گذاری کنند. عبدالظاهر تا زمان گرفتاریش در ماه جولای 2002 با این هسته دهشت افگنی ماند.

ث. عبدالظاهر با پرداخت تقریباً 60000 روپیه پاکستانی یک ماشین فتوکپی خریداری کرد تا با آن ورقه های ضد امریکائی تکثیر کند. این ورقه ها به شکلی طراحی شده بودند که افغان های مخالف امریکا را که در نزدیکی سفارت امریکا در کابل افغانستان و پایگاه های نظامی امریکا در بگرام و گردیز در افغانستان زندگی میکردند جلب کنند تا عملیات علیه عساکر امریکائی را پلان گذاری و اجرا کرده و تبلیغات ضد امریکائی نشر کنند.

ج. سازمان القاعده 50000 دالر امریکائی در اختیار عبدالظاهر قرار داده و به او دستور داد که از این پول برای عملیات دهشت افگنی علیه قوای ائتلاف استفاده کند. عبدالظاهر حد اقل در شش مورد جداگانه برای انجام عملیات تروریستی پول در اختیار سایر اعضای هسته دهشت افگنی قرار داد. اضافه بر این او در یک دفتر دیوان و محاسبه به تفصیل جزئیات مخارج و هزینه ها و معاملات در حمایت از عملیات دهشت افگنی را نوشته میکرد.

ج. سازمان القاعده یک تلفن ماهواره ای یا ستلایت و یک فهرست تلفن های دستی یا موبایل اعضای سازمان دهشت افگنی و نامهای مستعار آنان همراه با نامهای حقیقی آنها، به عبدالظاهر داد. برای اجتناب از شناخته شدن توسط قوای ائتلاف، اعضای هسته های دهشت افگنی، از جمله عبدالظاهر، برای تماسهای خود از نامهای مستعار استفاده میکردند. عبدالظاهر از تلفن مزبور و نامهای مستعار برای تماس با اعضای هسته تروریستی استفاده کرده و به آنها در موارد عملیات آینده، اکمالات، و معاملات تجاری معلومات میداد.

ج. در تاریخ 4 ماه مارچ 2002 یا حوالی آن، عبدالظاهر، عبدالکبیر، و عبدالحکیم یک عملیات دهشت افگنی در زورمت در افغانستان مرتکب شدند که در طی آن یک موتر در حال حرکت را که حامل خارجیان غیر نظامی بوده و در راه شمال به سوی گردیز در افغانستان میرفت، هدف قرار دادند. آنها یک بم دستی را از کلکین به داخل موتر پرتاب کرده و سه جورنالایست درون موتر را زخمی نمود.

خ. در ماه جولای 2002 و در زمان گرفتاری در لوگر در افغانستان، عبدالظاهر تقریباً 10000 دالر امریکائی و یک ماشین فتوکپی و یک دفتر دیوان و محاسبه در اختیار داشت.

اتهام 2: کمک به دشمن

14. عبدالظاهر (مشهور به عبدالبری) در افغانستان در تاریخ یا حوالی سالهای 1997 تا 2002 عمداً به دشمن، یعنی القاعده و طالبان، کمک میکرد و این عمل در چوکات و در ارتباط با جنگ مسلحانه بود.

اتهام 3: حمله به غیرنظامیان

15. عبدالظاهر (مشهور به عبدالبری) در افغانستان، در تاریخ یا حوالی 4 ماه مارچ 2002 به حیث یک عامل و باعث، و شریک در توطئه، و عضو یک دسته از افراد که دارای یک هدف مشترک جنائی بودند، یک معاون جرم یا شریک جرم، یا ترکیبی از اینها، غیر نظامی هائی را که در یک موتر در حال سفر به شمال به سوی گردیز در افغانستان بودند مورد حمله قرار داد و این عمل در چوکات و در ارتباط با جنگ مسلحانه بود.